82744-3

NO.

COA No. 36804-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Petitioner,

v.

MATTHEW HIRSCHFELDER,
Respondent.

STATE'S MOTION FOR REVIEW OF DECISION TERMINATING REVIEW

H. STEWARD MENEFEE
Prosecuting Attorney
MEGAN M. VALENTINE
Deputy Prosecuting Attorney

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951
WSBA #35570

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER

A. IDENTITY OF PETITIONER

Respondent, the State of Washington, by and through Megan M. Valentine, Grays Harbor County Deputy Prosecuting Attorney, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. RELIEF REQUESTED

The State seeks review of the Court of Appeals decision that reversed the decision of the superior court and ordered the case dismissed because the statute criminalizing Sexual Misconduct with a Minor does not criminalize sexual intercourse between a school employee and a registered student if the registered student is 18 years of age or older.[1] Division II's opinion was filed January 13, 2009.

C. ISSUE PRESENTED FOR REVIEW

Whether RCW 9A.44.093(1)(b) criminalizes sexual intercourse between a school employee and a registered student who is 18 years of age or older.

D. STATEMENT OF THE CASE

Matthew Hirschfelder was charged by Information filed in Grays

---

[1] A copy of the Court of Appeals decision is in the appendix at pages A-1 through A-21.

Harbor Superior Court on May 18, 2007 with one count of Sexual Misconduct with a Minor in the First Degree under RCW 9.44.093(1)(b)[2]

The State alleges that at the time of the incident Hirschfelder was employed by the Hoquiam School District as a Choir Teacher. A.N.T. was a student at Hoquiam High School, where Hirschfelder taught, and a member of the choir. Hirschfelder was more than 60 months older than A.N.T. on the night of the book signing, held at the school, Hirschfelder had sexual intercourse with A.N.T. A.N.T. was 18. The book signing was held a short time before A.N.T's graduation from Hoquiam High School.[3]

Hirschfelder filed a Motion to Dismiss under *Knapstad* on July 13, 2007 and subsequently challenged the Statute's constitutionality. On September 4, 2007, the trial court denied the Motion to Dismiss under *Knapstad* and found the statute Constitutional. Discretionary review was granted and Division II held that RCW 9A.44.093(1)(b) is ambiguous but that legislative history indicates that the legislature intended to only criminalize sexual contact between school employees and students aged 16

---

2 A copy is attached as Appendix B-1.

3 A copy of the motion and declaration in support of motion for bench warrant is attached as Appendix C1 through C-3.

and 17.[4] The State files this timely petition for review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Division II's decision that RCW 9A.44.093(1)(b) does not criminalize sexual intercourse between a school employee and registered student who is 18 directly conflicts with Division III's opinion in *State v. Clinkenbeard* and review is appropriate under RAP 13.4(b)(2). If the State prevails, review of the underlying right or privacy and vagueness issues raised is also appropriate as they involve significant questions of law under the Constitution of the State of Washington and of the United States as outlined in RAP 13.4(b)(3). Finally, review should be granted pursuant to RAP 13.4(b)(4) as this petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. Division II's interpretation that RCW 9A.44.093(1)(b) does not criminalize sexual intercourse between a school employee and registered student, even if the student was 18 years of age or older directly conflicts with *State v. Clinkenbeard* decided by Division III.

Division II's interpretation directly conflicts with that of Division III and therefore review should be granted pursuant to RAP 13.4(b)(2). The plain language of RCW 9A.44.093(1)(b) criminalizes sexual

---

[4] *State v. Hirschfelder*, ____ Wn.App. ____, * P.3d *, * (2009), Appendix A-1 through A-21.

intercourse between school employees and registered students who are 18 years of age or older.[5] RCW 9A.44.093(1)(b) makes it a class C felony when a

> person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student.

Division II first defined each of the two terms, "minor" and "student", neither of which is defined in the statute. "Minor" was found to be a person under the age of 18 because the legislature did not expressly define minor as someone over 18 for this statute.[6] "Student" was found to include a person up to the age of 21 enrolled in the common schools.[7] Division II then looked at the language "or knowingly causes another student under the age of eighteen to have". The court reasoned, because the teacher could not be under the age of 18, and because there must be more than one person who is under 18, that person would have to be the registered student.[8] The court then concluded that the inclusion of the word "minor"

---

5 RCW 9A.44.093 is attached as Appendix D-1.

6 *Hirschfelder*, ___ Wn.App. at 9.

7 *Id* at 11.

8 *Id* at 13.

and the requirement the student be under 18 if a third person is involved in the commission of the crime was an alternative reasonable interpretation so the statute was ambiguous.

"[A] court should 'take into consideration the meaning naturally attaching to . . .[statutory terms] from the context, and [ ] adopt the sense of the words which best harmonizes with the context.'"[9] The interpreting court should not render any portion of the statute meaningless, nor should its interpretation lead to absurd results.[10] Further, the legislature is presumed to be aware of its prior enactments when it enacts new statutes.[11]

On its face, subsection (1)(b) does not require that the victim be under 18. Neither "minor" nor "registered student" are defined in the statute. In fact, the word "minor" exists only as part of the title of the statute. The word "minor" is not repeated in the body of subsections (a), (b) or (c). Both subsections (a) and (c) limit the age of the victim to someone under the age of 18. Subsection (c) does this through reference to

---

9 *State v. Roggenkamp*, 153 Wash.2d 614, 623, 106 P.3d 196 (2005).

10 *State v. Brown*, 140 Wash.2d 456, 469; 998 P.2d 321 (2000).

11 *Baker v. Teachers Ins. & Annuities Assoc. College Retirement Equity Funds*, 91 Wash,2d 482, 588 P.2d 1164 (1979).

the victim being a foster child who is under 18 by controlling statute.[12] The legislature did not include this limiting language in subsection (b). Subsection (b) only requires that the victim be at least 16 years old.

Division II concluded that the legislature viewed the phrase "under the age of eighteen" as mere surplusage and, therefore, did not include it in subsection (b).[13] The court must assume the legislature is aware of its other enactments when it enacts legislation. The Basic Education Act limits registration for students to persons between five and twenty-one. Clearly the legislature was aware that a registered student could be any of these ages and, mindful of other statutes criminalizing sexual intercourse with persons under 16, elected to enact this statute including only the restriction that the victim must be 16 year or older. Division II erred in concluding the legislature's exclusion of this language was because it would be meaningless.

All three subsections of the statute contain the language, "or knowingly causes another person under the age of eighteen to have,". This language is set off by commas at the beginning and end. A phrase is a

---

12 RCW 9A.44.093(1)(a) and (c).

13 *Hirschfelder*, _____ Wn. at 19.

word group that lacks a subject and/or a predicate and functions as a single part of speech. A clause is a group of related words that contain a subject and a predicate.

A dependent clause is a nonrestrictive clause if it is set off by commas. A restrictive clause is not set off by commas.[14] Because this clause, "or knowingly causes another person under the age of eighteen to have," is set off at the beginning and end with a comma, it is a nonrestrictive clause and, therefore, does not modify the meaning of the main clause.[15] Therefore, this clause can not alter the meaning of "registered student".

The language "under the age of eighteen" does not mean the registered student is "under the age of eighteen". This phrase is part of a dependent nonrestrictive clause. Therefore, the clause may be removed completely from the sentence without altering the meaning of the sentence. This does not mean the language is meaningless, it simply designates it, as the legislature intended, to create an alternative means of committing the offense. This is why the language beings with the conjunction "or".

---

14 *Chicago Manual of Style*, 5.34, 5.35, 5.41, pages 166-168.

15 *Supra.*

Division II has used the word "minor" to create a new offense element.

Subsection (b) requires that the victim be "a registered student of the school who is at least sixteen years old". According to the Basic Education Act "[e]ach school district's kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age . . . and less than twenty-one years of age.".[16] Because a registered student may be up to twenty-one years old, a victim under subsection (b) may be up to twenty-one years old. The Basic Education Act does not differentiate in its duty to provide education to students based on their age and neither do the safeguards that protect those students.[17]

Even if the statute is ambiguous, the legislature intended the statute apply to registered students 18 or older. Sexual Misconduct with a Minor in the First Degree was amended in 2001 to make the previous statute sub-section (a) and to add a sub-section (b) and (c).

This most recent amendment began as House Bill 1091. That bill was vetoed by the Governor and the phrase "if the employee is at least sixty months older than the student" was added and the amendment was

---

16 RCW 28A.150.220(3).

17 *Clinkenbeard*, 130 Wash.App at 565 (discussing [t]he state's interest in providing a safe school environment and preventing the exploitation of students).

reintroduced as House Bill 2262 in May 2001. This phrase is the only difference between House Bill 1091 and House Bill 2262. That bill ultimately became the law first went before the Senate as Third Engrossed Substitute Senate Bill 6151 on June 20, 2001.[18]

When HB 2262 was introduced after the Governor vetoed HB 1091 the sponsoring representative, Representative Lambert, indicated to the house she had worked with the Governor's office as well as the Senate in creating the new bill.[19]

The House Bill Report on HB 1091 states under "**Substitute Bill Compared to Original Bill**" that "[t]he substitute bill eliminates the requirement that the student be under the age of 18, thus covering registered students over the age of 18 who are completing independent education plans."[20] This bill ultimately was vetoed by the governor due to concerns the statute would criminalize sexual intercourse between two

---

18 Legislative History of Bill: SB 6151, http://dlr.leg.wa.gov/billsummary/default.aspx?year=2001&bill=6151 (accessed August 7, 2007).

19 June 4, 2001, 40:01, archives, House of Representatives Floor 2001, www.tvw.org (accessed August 8, 2007).

20 Attached as Appendix E-1 through E-3.

students, one of whom also worked for the school.[21] The bill that became law contained the exact same wording as the original bill with one addition, it required that the school employee be at least sixty months older than the registered student. There were also numerous other interpretations and bill reports indicating that the legislature did intend to limit the age of the victim to someone who was 16 or 17, these were relied upon by Division II.

Division II erred in concluding the legislative history showed the legislature intended to criminalize only sexual intercourse between school employees and registered students who were 16 or 17. The only change to the legislation after the veto of the original enactment was to limit the age of the defendant, not the victim. The governor's veto statement also expressed concern, not with the victim's age, but the defendant's.[22]

Section (b) of RCW 9A.44.093 was challenged in The Court of Appeals, Division Three in 2005 in a case involving sexual intercourse between a school bus driver and an 18 year old registered student of the

---

21 Attached as Appendix E-4.

22 Supra.

school district in which the driver was employed.[23] Division III was asked to determine whether the statute was (1) facially unconstitutional; (2) in violation of the defendant's substantive due process rights or (3) violated equal protection. The court began its analysis by stating:

> RCW 9A.44.093(1)(b) makes it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student. By its terms, this statute can be applied to criminally prosecute a public school employee who has sexual intercourse with a student who is legally an adult (over the age of 18) and does not require the school employee to be in a position of authority or supervision over the students.[24]

This statute has been interpreted by Division Three to apply to a victim who is over the age of 18.[25] Because these decisions are in direct conflict, this Court should accept review and resolve this discrepancy.

2. If the State prevails, a significant question of law under the Washington State Constitution and United States Constitution has been raised and it should be determined whether or not the statute, as applied, is unconstitutionally vague or violates the defendant's right of privacy.

While Division II declined to reach the significant Constitutional

---

23 *Clinkenbeard*, 130 Wash.App. 552, attached as Appendix I-1 through I-17.

24 *State v. Clinkenbeard*, 130 Wash.App. 552, 560, 123 P.3d 872 (2005).

25 *Id.*

questions, because it decided the case based on statutory interpretation, if the State prevails, these appealed rulings of the trial court will remain unresolved and review should be granted pursuant to RAP 13.4(b)(3).

(A) The statute is not unconstitutionally vague if it applies to sexual intercourse between school employees and registered students who are 18.

The due process vagueness doctrine under the Federal and State Constitutions serves two purposes: (1) to ensure the statute provides the public with adequate notice of what conduct is prohibited, and (2) to protect the public from arbitrary or discriminatory law enforcement.[26] A statute is presumed constitutional "unless its unconstitutionality appears beyond a reasonable doubt."[27] Some imprecisions or uncertainty are constitutionally permissible and absolute specificity is not required.[28] The statute is to be viewed as a whole and in the context of the entire

---

26 U.S.C.A. Const. Amend. 14; RCWA Const. Art. 1, §§ 3; *State v. Riles*, 135 Wash.2d 326, 957 P.2d 655 (1998); *State v. Pollard*, 80 Wash.App. 60, 906 P.2d 976 (1995), review denied 129 Wash.2d 1011, 917 P.2d 130.

27 *State v. Aver*, 109 Wash.2d 303, 746 P.2d 479 (1987).

28 *State v. Stevenson*, 128 Wash.App. 179, 114 P.3d 699 (2005); *State v. Dyson*, 74 Wash.App. 237, 872 P.2d 1115 (1994), review denied 125 Wash.2d 1005, 886 P.2d 11331.

enactment, to determine if it has the required degree of specificity.[29]

The title of the statute does not control the meaning of the statute.[30] The body of the statute is where the offense is defined. The title may be used to determine legislative intent if the text contains an ambiguity.[31]

RCW 9A.44.093(1)(b) is definite and specific. The fact that the legislature placed an age limit on the victim in section (a) should not be implied as a legislative oversight in section (b). The statute should be given its plain meaning as enacted.[32] That the term "at least sixteen years old" would include someone who is 18 is a reasonable interpretation and is not vague beyond a reasonable doubt.

B. Sexual intercourse between a school employee and registered student is not a fundamental right and the legislation passes rational basis review.

The right of privacy is a well established penumbral right guaranteed to all persons under the United States Constitution.[33] The right

---

29 *State v. Myles*, 127 Wash.2d 807, 903 P.2d 979 (1995).

30 *Equipto Division v. Yarmouth*, 134 Wash.2d, 356, 950 P.2d 451 (1998).

31 *City of Spokane v. State*, 198 Wash. 682, 89 P.2d 826 (1939).

32 *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007).

33 Article 14 of the United States Constitution is attached as Appendix G-1.

of privacy is also an enumerated right guaranteed to all citizens by the Washington State Constitution.[34] The right to intimate association is a recognized zone of the right of privacy. The level of protection a person is guaranteed depends upon the association itself.

The right of intimate association protects "the choices to enter into and maintain certain intimate human relationships".[35] The courts have recognized zones of privacy each subject to varying levels of constitutional protection. Fundamental rights of privacy include the right to marital privacy, the use of contraception, bodily integrity and abortion.[36]

The Supreme Court ruled in *Lawrence v. Texas* that there is a privacy interest in consensual homosexual contact.[37] This ruling overturned *Bowers v. Hardwick*[38] and held that "decisions concerning the

---

34 Article I, Section 7 of the Washington State Constitution is attached as Appendix F-1.

35 *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)

36 *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

37 *Lawrence v. Texas*, 539 U.S. 558, 560, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

38 *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by due process."[39]

The *Lawrence* Court, however, did not elevate consensual homosexual contact to a fundamental right subject to strict scrutiny. The Court applied a rational basis review.[40] The "marital zone of privacy", a fundamental right, was enumerated in *Griswold v. Connecticut*.[41] The right was described as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred".[42]

RCW 9A.44.093(1)(b) does not involve marital relationships and specifically excludes persons married to each other. Intimate sexual intercourse between a school district employee and a registered student does not fall within the "martial zone of privacy" and sexual intercourse between a high school teacher and his student is not fundamental.

The Connecticut Supreme Court conducted a through analysis of *Lawrence* and the right of privacy and found "the right of sexual privacy

---

39 *Lawrence,* 539 U.S. at 560.

40 *Id* at 586 (Scalia, dissenting).

41 *Griswold*, 381 U.S. at 485.

42 *Id* at 486.

purportedly delineated in *Lawrence* would not apply to the circumstances of the present case".[43] The Connecticut court found the right of privacy in their State Constitution did not extend to sexual privacy between a teacher and a student.[44] The *McKenzie-Adams* court then applied the rational basis test and found their statute to be constitutional.

The conduct regulated by RCW 9A.44.093(1)(b) involves a relationship created by the defendant's employment at the school district and the student's enrollment at the school district. This is not a relationship of longevity or commitment and the inclusion of sexual intimacy in this relationship is not protected by the United States or Washington State Constitutions.

Even where the right of privacy is infringed upon, the infringement is not unconstitutional if it can withstand scrutiny regarding the statute and the state interest.[45] When the State regulation intervenes with a person's Constitutional rights, the legislation is subject to scrutiny depending upon

---

43 *State v. McKenzie-Adams*, 281 Conn. 486, 507, 915 A.2d 822 (S.Ct. Conn. 2007).

44 *McKenzie-Adams* at 508-515 (Connecticut Constitution Amendment XIV, §1 "No State shall . . . deprive any person of life, liberty or property, without due process of law").

45 *State v. Farmer*, 116 Wash.2d 414, 421, 805 P.2d 200 (1991).

the right infringed upon. If the right is a fundamental right, strict scrutiny applies and the statute must be narrowly tailored to serve a compelling government interest.[46] If the right is not a fundamental right, the statute must pass the rational basis standard which requires the statute be rationally related to a legitimate state interest.[47]

The *Lawrence* Court applied a rational basis review, not a fundamental rights analysis and found that the statute, based in moral regulation, furthered no legitimate state interest which justified the "intrusion into the personal and private life of the individual".[48] In the present case, there is a legitimate state interest.

In *State v. McKenzie-Adams*, the Connecticut Supreme Court stated "[i]n light of the disparity of power inherent in the teacher-student relationship, we conclude that both victims were situated in an inherently coercive relationship with the defendant wherein consent might not easily

---

46 *Anderson v. King County*, 158 Wash.2d 1, 24, 128 P.3d 963 (2006).

47 *DeYoung v. Providence Med. Ctr.*, 136 Wash.2d 136, 148, 960 P.2d 919 (1998) (quoting *Fed. Commc'ns comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

48 *Lawrence*, 539 U.S. at 578.

be refused."[49] The Connecticut statute, like RCW 9A.44.093(1)(b) prohibited "a secondary schoolteacher from having sexual intercourse with a student enrolled in the school in which that teacher is employed, regardless of the age of the student and regardless of the allegedly consensual nature of the sexual relationship."[50]

The State has a legitimate interest and rational basis for protecting children from sexual exploitation. The state is required by the Constitution to provide public education and must provide a safe school environment.[51] The statute applies to school district employees and the students registered in their school district. The fear that school district employees with their unique access to children, might abuse their position and groom children or coerce them to engage in sexual intercourse, is a compelling and legitimate State interest.

3. Whether or not RCW 9A.44.093(1)(b) criminalizes sexual intercourse between a school employee and a registered student who is 18 years of age or older is an issue of substantial public interest that should be determined by the Supreme Court.

---

49 *McKenzie-Adams*, 281 Conn. at 506.

50 *McKenzie-Adams*, 281 Conn. at 501.

51 Const. Art. IX, attached as Appendix H-1 through H-2.

The issues involved are of substantial public interest and should be determined by the Supreme Court pursuant to RAP 13.4(b)(4). The State is required by the Constitution to provide public education and, the state must provide a safe school environment.[52] RCW 9A.44.093(1)(b) applies to school district employees and the students registered in their school district. The fact that the statute does not apply to registered students at any School District shows the concern of the legislature for the potentially coercive nature of the contact.

The fear that School District Employees with their unique access to children, might abuse their position and groom children or coerce them to engage in sexual intercourse, is an issue of substantial public interest. To characterize this relationship as "consensual" is misleading. In enacting this legislation, the legislature recognized that a victim might agree to engage in sexual intercourse despite not wanting to due to the school district employee's influence over the student. Over time a unique relationship may have developed through the victim's confiding in the school district employee. The victim may view the school employee as a mentor or other adult to be trusted. This unique relationship is exploited

---

52 Washington State Const. Art. IX.

by the school district employee when the school employee persuades the victim to engage in sexual intercourse while the victim is still a registered student, regardless of the student's age. RCW 9A.44.093(1)(b) does not criminalize sexual intercourse between school district employees and students of other school districts or students married to school district employees. Whether or not RCW 9A.44.093(1)(b) continues to protect students from predatory school district employees once the student has turned 18 is a matter of substantial public interest. Because school district employees often interact with a student for many years, often beginning even before they are 16, ensuring the safety and well being of registered students at the public schools is a matter of public interest.

F. CONCLUSION

Review should be granted for the reasons stated above.

Respectfully Submitted this 11th day of February, 2009.

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW J. HIRSCHFELDER, Appellant.	No. 36804-8-II PUBLISHED OPINION

VAN DEREN, C.J.—Matthew Hirschfelder appeals the trial court's denial of his motion under *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) to dismiss the charge of first degree sexual misconduct with a minor, contrary to RCW 9A.44.093(1)(b). He contends that the trial court erred because the facts as alleged do not constitute a crime under RCW 9A.44.093(1)(b); alternatively, he argues that if the statute criminalizes sexual contact with an 18-year-old student, it (1) is unconstitutionally vague and/or ambiguous and (2) violates his right to equal protection

under the constitution.[1] We hold that the statute is ambiguous but legislative history indicates that the legislature intended to only criminalize sexual contact between school employees and students aged 16 and 17 in RCW 9A.44.093(1)(b); therefore, we reverse and remand for dismissal.

FACTS

The abbreviated facts in the record on appeal indicate that, on the night of a book signing at Hoquiam High School, Hirschfelder, a high school choir teacher, allegedly had sexual intercourse with AMT,[2] an 18-year-old member of the high school choir. Hirschfelder was more than 60 months older than AMT. This incident occurred shortly before AMT graduated from high school.

The State charged Hirschfelder with one count of first degree sexual misconduct with a minor, under RCW 9A.44.093(1)(b). Hirschfelder filed a motion to dismiss under *Knapstad* and a second motion to declare RCW 9A.44.093(1)(b) unconstitutional and to dismiss.

The trial court denied Hirschfelder's motions, but certified "that [its] order involves a controlling question of law as to which there is substantial ground for a difference of opinion and

---

[1] We granted requests of the Washington Education Association (WEA) and the Washington Association of Criminal Defense Lawyers (WACDL) to file amicus curiae briefs. Hirschfelder argues in his statement of additional grounds for review (SAG), RAP 10.10, that RCW 9A.44.093 is unconstitutionally vague and "corrupt." SAG at 2. WEA argues that the statute fails for vagueness under amendment XIV of the United States Constitution and article I, section 3, of the Washington Constitution. WACDL argues that it violates the right to privacy under the Washington Constitution, article I, section 7, as applied to these facts. The State responds to WEA's argument by arguing that the statute does pass constitutional muster. Because we decide that the legislature did not intend to criminalize sexual behavior with registered students 18 and older, we do not address the constitutional claims raised.

Appendix A-2

[2] The trial court record and all parties refer to the student by her initials. We use the initials AMT for clarity and consistency.

that immediate review of the order may materially advance the ultimate determination of the litigation." Clerk's Papers (CP) at 117. We granted Hirschfelder's subsequent petition for discretionary review.

ANALYSIS

Hirschfelder asserts that the trial court erred in failing to grant his motion for dismissal under *Knapstad*. On appeal, he first argues that he did not commit a crime under the plain language of RCW 9A.44.093(1)(b) because it implicitly limits the age of the victims to 16- and 17-year-olds. Alternatively, he argues that RCW 9A.44.093(1)(b) is unconstitutionally vague and/or ambiguous and, if the statute proscribes sexual contact between school employees and students who are 18 or older, it violates his right to equal protection under the law. We agree with Hirschfelder and hold that the legislature intended to criminalize sexual misconduct between registered students who are 16- and 17-years-old and school employees who are at least 60 months older than these students. Therefore, the trial court erred when it did not grant Hirschfelder's motion to dismiss under *Knapstad*. Because we resolve the argument using principles of statutory construction, we do not address the constitutional challenges to RCW 9A.44.093(1)(b) and reverse and remand for dismissal of the charge against Hirschfelder.

I. *KNAPSTAD* MOTION

Here, as the trial court recognized, its decision on Hirschfelder's *Knapstad* motion is determinative of the matter. To prevail on a *Knapstad* motion, the defendant must establish that "there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt." 107 Wn.2d at 356. We review a trial court's denial of a *Knapstad* motion de novo. *See State v. O'Meara*, 143 Wn. App. 638, 642, 180 P.3d 196 (2008). Appendix A-3

RCW 9A.44.093 states that a "person is guilty of sexual misconduct with a minor in the first degree" in three situations. Under RCW 9A.44.093(1)(b),[3] which applies here, a school employee is guilty of sexual misconduct with a minor if he or she has sexual intercourse with a student who is (1) at least 16-years-old, (2) at least 60 months younger than the employee, and (3) not married to the employee. The parties dispute whether RCW 9A.44.093(1)(b) prohibits sexual intercourse with minor students aged 16 and 17 *only* or with *all* students 16 and older.

For purposes of the *Knapstad* motion, Hirschfelder conceded the truth of the alleged facts, (1) he had sexual intercourse with the student AMT when she was 18-years-old, (2) he is more than 60 months older than AMT, and (3) he was not married to AMT at the time. Since there are no material facts in dispute, the only issue is whether the undisputed facts satisfy the

---

[3] RCW 9A.44.093 states:

> (1) *A person is guilty of sexual misconduct with a minor in the first degree when*: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim; (b) *the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student;* or (c) the person is a foster parent who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with his or her foster child who is at least sixteen.
>
> (2) Sexual misconduct with a minor in the first degree is a class C felony.
>
> (3) For the purposes of this section, "school employee" means an employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.

Appendix A-4

(Emphasis added.)

elements of sexual misconduct with a minor; in other words, whether RCW 9A.44.093(1)(b) prohibited Hirschfelder from having sexual intercourse with an 18-year-old student.

II. STATUTORY AMBIGUITY

Hirschfelder first argues that under RCW 9A.44.093(1)(b), "minor" means a "person under the age of eighteen" because that is both its common and legal definition. Moreover, he asserts that the statute as a whole implicitly establishes the victim's maximum age as 17 when subsection (b) is read in the context of (a) and (c). Subsection (a) explicitly establishes the victim's age as either 16 or 17. Subsection (c) deals with sexual misconduct with a "foster child who is at least sixteen," RCW 9A.44.093(1)(c), and thus implicitly applies to victims who are 16 and 17 because a foster child is statutorily defined as "a person less than eighteen years of age."[4] RCW 74.13.020(5). Finally, Hirschfelder argues that subsection (b) is ambiguous if it is interpreted differently from subsections (a) and (c) to proscribe sexual contact with persons who are not minors, because it leaves persons of common intelligence to guess at its meaning and disagree about its applicability. Furthermore, he argues that this ambiguity is enhanced by the phrase prohibiting a school employee from causing "another person under the age of eighteen" to engage in sexual intercourse with the victim.[5] Br. of Appellant at 21 (quoting RCW 9A.44.093(1)(b)).

---

[4] Hirschfelder points to our decision holding that a "foster child" is under the age of 18. *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 873, 103 P.3d 240 (2004).

[5] Hirschfelder also argues that RCW 9A.44.093(1)(b) does not apply to sexual intercourse with students over 17 because the laws of other states (North Carolina, Ohio, Connecticut, and Texas) that criminalize this behavior do not use the word "minor." We need not address this argument because we can resolve the issue based on Washington law.

The State counters that the legislature's failure to define "minor" in RCW 9A.44.093 or anywhere in chapter 9A.44 RCW does not mean that the legislature intended to restrict the definition of "minor" to a person under the age of majority. The State also argues that subsections (a) and (c) of RCW 9A.44.093(1) do not control the definition of "minor" in subsection (b) because subsections (a) and (c) either explicitly or implicitly limit the victims to 16- and 17-year-olds. Instead, the State argues that the legislature's use of the phrase "'a registered student of the school who is at least sixteen years old'" refers to students who are less than 21 years of age, based on the Basic Education Act's statement that "'[e]ach school district's kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age . . . and less than twenty-one years of age.'" Br. of Resp't at 10 (quoting RCW 9A.44.093(1)(b); RCW 28A.150.220(3)). Thus, the State concludes that the phrase "at least sixteen years old" can be reasonably interpreted to include someone who is 18.

A. Rules of Statutory Construction

For the purposes of this appeal, we must first determine whether the plain language of RCW 9A.44.093(1)(b) establishes the age of victims and, if not, we then review the legislative history and relevant case law to ascertain the statute's meaning. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). "'[I]f the statute's meaning is plain on its face, then [we] must give effect to that plain meaning.'" *Christensen*, 162 Wn.2d at 372 (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). "In the absence of []specific statutory definition[s]," we give words their common legal or ordinary meaning. *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). We give non-technical words their dictionary definition. *Chester*, 133 Wn.2d at 22.

Appendix A-6

We also discern plain meaning from the context of the statute containing the provision, related provisions, and the statutory scheme as a whole. *Christensen,* 162 Wn.2d at 373. We interpret and construe statutes "'so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" *State v. Roggenkamp,* 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). When interpreting a criminal statute, "we give it a literal and strict interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

If a plain meaning analysis fails to resolve the matter, we next turn to legislative history and relevant case law to discern the legislature's intent regarding the age of victims under RCW 9A.44.093(1)(b). *See Christensen*, 162 Wn.2d at 373. "The court's purpose in construing a statute is to ascertain and give effect to the intent and purpose of the Legislature." *State v. Van Woerden,* 93 Wn. App. 110, 116, 967 P.2d 14 (1998). Finally, if we cannot resolve an ambiguity through these steps, we apply the rule of lenity in favor of the accused. *State v. Stratton,* 130 Wn. App. 760, 764-65, 124 P.3d 660 (2005).

B. Plain Language of RCW 9A.44.093(1)(b)

RCW 9A.44.093(1)(b) uses the terms "minor" and "student" and the phrase "another student under the age of eighteen." The legislature did not define "minor" or "student" in RCW 9A.44.093 or in chapter 9A.44 RCW. Furthermore, it did not define synonyms like "child" or "juvenile." *See* RCW 9A.44.010.

1. "Minor"

According to a common usage dictionary, the relevant definition of "minor" is "a person of either sex under full age or majority : one who has not attained the age at which full civil rights are accorded : one who in England and generally in the U.S. is under 21 years of age."

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1439 (2002). BLACK'S LAW DICTIONARY defines the "age of majority" as "[t]he age, usu[ally] defined by statute as 18 years, at which a person attains full legal rights. . . . In almost all states today, the age of majority is 18, but the age at which a person may legally purchase and consume alcohol is 21." BLACK'S LAW DICTIONARY 66 (8th ed. 2004). "Minor" is defined without specifying an age, using other similar words, namely, "child," "juvenile," and even "*infant*."[6] BLACK'S LAW DICTIONARY 1017 (8th ed. 2004). Thus, according to dictionary meanings, "minor" could mean anyone under the age of majority, inclusive of 18- to 21-year-olds, or it could mean only those under age 18.

Because the definition of "minor" in RCW 9A.44.093(1)(b) is unresolved by dictionary definitions, we next look to the statutory context. In the Revised Code of Washington, statutory language generally refers to persons under the age of 18 as minors. 19 KENNETH W. WEBER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 22.2, at 461-62 (1997). Moreover, at age 18, persons are deemed to be "of full age" for the purposes of "decisions in regard to their own body," unless otherwise provided by statute. RCW 26.28.015(5).[7] Although statutory terminology is not always consistent, the language referring to those under 18 can

[6] The State defines each of these words, showing that the age of a "child" or "infant" is less than 18, though the maximum age of a "juvenile" is 18 and concludes that the plain meaning of "minor" is not a person under 18. But the meanings of these four words are not coextensive; rather, they are provided as rough substitutes. While an infant will always be a minor, a minor will not always be an infant.

[7] The State argues that RCW 26.28.015(5) is inapposite because (1) it regulates decisions by persons with regard to their bodies (in this case, the students), while the statute at issue, RCW 9A.44.093(1)(b), regulates the conduct of school employees and (2) RCW 9A.44.093(1)(b) is not limited to situations of consensual sexual intercourse. The central issue here, however, is the student's age for the purposes of this criminal statute. RCW 26.28.015(5) supports Hirschfelder's argument that under RCW 9A.44.093(1)(b) the legislature criminalized sexual misconduct with 16- and 17-year-olds because 18-year-olds can make decisions regarding their bodies, including whether to have intercourse.

easily be interpreted to refer to minors in most cases. *See, e.g.*, RCW 26.28.060 (statute regulating employment of young persons uses the term "child"); RCW 13.04.240, .300 (Juvenile Court Act often uses terms "juvenile" or "child"). RCW 26.28.010 establishes that a person is accorded full civil rights at the age of 18, with the exception of alcohol consumption.

Furthermore, the legislature placed RCW 9A.44.093 and RCW 9A.44.096, "Sexual misconduct with a minor," among the statutory descriptions of other offenses or statutes dealing with children, such as "Rape of a child," RCW 9A.44.073, .076, .079; "Child molestation," RCW 9A.44.083, .086, .089; and "Admissibility of child's statement," RCW 9A.44.120. It is significant that this statute is grouped with criminal offenses against children, none of which criminalizes acts with victims over age 16. Moreover, in chapter 9.68A RCW, under the chapter heading "Sexual Exploitation of Children," the legislature defined "minor" as "any person under eighteen years of age." RCW 9.68A.011(4). This explicitly limiting definition applies to numerous crimes involving sex-related offenses and minors. *See* ch. 9.68A RCW. Given the dictionary definitions and common usage of "under eighteen" as the standard for "minor" in the Revised Code of Washington, we apply that meaning to RCW 9.44.093(1)(b).

2. "Student"

If the legislature had used only the term "minor" in RCW 9A.44.093(1)(b), the plain meaning of the term would be resolved by the applicable analysis. But the statute also refers to "students" and provides that a school employee may not cause "another person under the age of eighteen" to engage in sexual intercourse with the victim. RCW 9A.44.093(1)(b). The statute

deals with the relationship between "school employee[s]," defined in section (3),[8] and "student[s]." RCW 9A.44.093(1)(b) does not define the age range for "students," nor does it clearly indicate to whom it refers as "another person."

As with the word "minor," we first turn to common language dictionaries in an attempt to determine the age of a "student." *See Chester*, 133 Wn.2d at 22. Unlike definitions that establish the age of "minors," we find no plain language dictionary definition explicitly establishing the age of "students" and neither the parties nor amici supplied a plain language dictionary definition of a student's age. Dictionaries define "students" only by referring to their level of schooling: "one enrolled in a class or course in a school, college, or university." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2268 (2002). Thus, the plain meaning of the word "student" used in RCW 9A.44.093(1)(b) is unresolved by dictionary definitions.

Turning to the statutory context, we find that RCW 9A.44.130(10)(d), which deals with sex offenders and kidnappers, defines "student" more expansively than "minor," but again without reference to age and only for the purpose of the statute itself and related offender-registration statutes.[9] RCW 9A.44.130(10)(d). On the other hand, the Office of Superintendent

---

[8] RCW 9A.44.093(3) states, "For the purposes of this section, 'school employee' means an employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school." It is undisputed that Hirschfelder is a "school employee" under this definition. Also, because persons over the age of 18 can attend public common schools, the definition of "school employee" does not narrow the age range of "students."

[9] "'Student' means a person who is enrolled, on a full-time or part-time basis, in any public or private educational institution. An educational institution includes any secondary school, trade or professional institution, or institution of higher education." RCW 9A.44.130(10)(d).

of Public Instruction defines "student" without resorting to the use of the word "minor,"[10] WAC 181-87-040, and the Basic Education Act defines the age range of "students" by providing that Washington offers basic education "to all students who are five years of age . . . and less than twenty-one years of age." RCW 28A.150.220(3). "[I]t is the general policy of the state that the common schools shall be open to the admission of all persons who are five years of age and less than twenty-one years residing in that school district." RCW 28A.225.160.

The Ninth Circuit Court of Appeals, in a concurring and dissenting opinion, interpreted RCW 9A.44.093(1)(b) to limit the age of student-victims to those under 18, noting that Washington is one of many states that "raise[s] the age of consent to 18 if the actor is a parent, guardian, *teacher*, person in a position of authority, or another relative." *United States v. Rodriguez-Guzman*, 506 F.3d 738, 748, 748 n.2 (9th Cir. 2007) (Siler, J., concurring in part and dissenting in part on issue of whether California's age of consent at age 18 is out of step with the vast majority of states) (emphasis added). Thus, we conclude that for the purposes of RCW 9A.44.093(1)(b), the common and legal definitions of "students" conflicts with those of "minor"

---

[10] WAC 181-87-040 states:

> As used in this chapter, the term "student" means the following:
>
> (1) Any student who is under the supervision, direction, or control of the education practitioner.
>
> (2) Any student enrolled in any school or school district served by the education practitioner.
>
> (3) Any student enrolled in any school or school district while attending a school related activity at which the education practitioner is performing professional duties.
>
> (4) Any former student who is under eighteen years of age and who has been under the supervision, direction, or control of the education practitioner. Former student, for the purpose of this section, includes but is not limited to drop outs, graduates, and students who transfer to other districts or schools.

because the two words refer to groups who may be of differing age ranges (between 18 and 21 and under 18, respectively).

3. "Another person under the age of eighteen"

The parties also dispute the legislature's intent regarding the age of the student-victim by RCW 9A.44.093(1)(b)'s reference to "another person under the age of eighteen" in the intervening phrase "or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student." The statute dictates that the actions of three different persons may give rise to criminal liability for a school employee for sexual misconduct with a minor: (1) the school employee, who must be at least 60 months older than the student; (2) the registered student, who must be at least 16; and (3) "another person under the age of eighteen." RCW.9A.44.093(1)(b).

We analyze this disputed phrase relating to the third person ("another person under the age of eighteen") according to rules of grammar. "A phrase that is restrictive, that is, essential to the meaning of the noun it belongs to, should not be set off by commas. A nonrestrictive phrase, however, *should* be enclosed in commas or, if at the end of a sentence, preceded by a comma." THE CHICAGO MANUAL OF STYLE § 6.31 at 248 (15th ed. 2003). The State argues that the presence of commas around the entire phrase "or knowingly causes another person under the age of eighteen to have" makes "another person under the age of eighteen" nonrestrictive, so that it does not modify either the age of the school employee or the age of the student-victim in RCW 9A.44.093(1)(b). Essentially, the State reads the intervening phrase,[11]

[11] We refer to the language at issue as a phrase rather than a clause given its grammatical construction. *See* WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 417, 1704 (2002).

"another person under the age of eighteen" wholly separate from the remainder of RCW 9A.44.093(1)(b) and, in essence, reads out the portion referring to "under the age of eighteen."

The State implicitly argues that "another person" should be read as simply a *different* person than the school employee. We agree that "another" can be defined as either "different or distinct from the one first named or considered" or "being one more in addition to one or a number of the same kind." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (2002). We also agree that "another person" is a different person than the school employee but we do not read "another person" out of the statute. We must interpret and construe statutes "'so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" *Roggenkamp,* 153 Wn.2d at 624 (internal quotation marks omitted) (quoting *J.P.*, 149 Wn.2d at 450). Thus, our analysis here focuses on the entire disputed portion "another person under the age of eighteen." RCW 9A.44.093(1)(b).

Use of the modifying descriptor, "under the age of eighteen," restricts the immediately preceding noun "another person." The legislature's juxtaposition of the noun and the modifying language shows its intent that both the registered student and "another person" knowingly caused by the school employee to have sexual intercourse with a registered student be under the age of 18. RCW 9A.44.093(1)(b) requires that any school employee charged with sexual misconduct with a registered student be at least 60 months older than the student-victim. Because any registered student-victim must be at least 16, any charged school employee must be at least 21-years-old (or nearly so, depending on when the 60 months is satisfied). Based on these numbers, the school employee can never be under the age of 18 and can, therefore, never be "another person under the age of eighteen" for purposes of RCW 9A.44.093(1)(b). Appendix A-13

Applying rules of statutory construction, the definition of "another person" in RCW 9A.44.093(1)(b) is thus a *second* person of the *same kind* as the student, who is necessarily the only other person who can be under the age of 18. Stated another way, the school employee must always be at least 21 and the student-victim must always be under 18 because the person who is "another person under the age of eighteen" must be a second person under the age of 18.

But this interpretation of RCW 9A.44.093(1)(b) does not resolve the conflict with the legislature's use of the term "student," which includes those between the ages of 18 and 21. Clearly, persons of common and greater than common intelligence differ on the reasonable interpretation and effect of RCW 9A.44.093(1)(b). "'[A] statute that is susceptible to two or more reasonable interpretations is ambiguous.'" *State v. Carter,* 138 Wn. App. 350, 356, 157 P.3d 420 (2007) (quoting *State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998)). Unless legislative intent indicates otherwise, "the rule of lenity requires that we interpret [RCW 9A.44.093(1)(b)] in favor" of Hirschfelder. *Stratton*, 154 Wn. App. at 765. Thus, we examine the legislative history of RCW 9A.44.093(1)(b) to further clarify and discern the legislature's intent regarding the age of victims under the statute.

C. Legislative History of RCW 9A.44.093(1)(b)

In RCW 9A.44.093(1)(b), interpretation of the word "minor" and the phrase "another person under the age of eighteen" conflict with the arguable age range of "student." Because the plain meaning of RCW 9A.44.093(1)(b) is unclear, we resort to legislative history and relevant case law to construe its meaning, keeping in mind that our "fundamental objective is to ascertain and carry out the Legislature's intent." *Ecology,* 146 Wn.2d at 9.

1. The Original Bill

When RCW 9A.44.093(1)(b) was first introduced in 2001, it prohibited a school employee from having sexual intercourse with a student 16- or 17-years-old, if the employee was a supervisor of the student and the two were not married. H.B. 1091, at 2, 57th Leg., Reg. Sess. (Wash. 2001). The legislature removed the under age 18 limit for student-victims from the substitute bill, along with the requirement of a supervisory relationship. SUBSTITUTE H.B. 1091, at 1, 57th Leg., Reg. Sess. (Wash. 2001). The House Bill Report[12] explains that "[t]he substitute bill eliminates the requirement that the student be under the age of 18, thus covering registered students over the age of 18 who are completing independent education plans." The purpose of the bill was to "close [a] loophole" in the law at the time which "require[d] that [the State prove an] actual threat or promise to use the [defendant's] authority to the detriment or benefit of the student" in exchange for sexual intercourse with the student.[13] H.B. REP. on Substitute H.B. 1091, at 2, 57th Leg., Reg. Sess. (Wash. 2001).

The Senate Bill Report also focused on closing the loophole, but stated that

> [s]exual activity should be prohibited between all school employees and *all* students, regardless of whether the employee is a teacher of that particular student or abuses a supervisory position with the student. The current law does not

---

[12] "In the past, [we] ha[ve] looked to legislative bill reports and analyses to discern the Legislature's intent." *State v. Reding*, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992).

[13] The State relies on statements by unnamed persons before the House Criminal Justice/Corrections Committee on January 29, 2001, supporting the view that *all* sexual intercourse between students and school employees should be prohibited. These statements support the State's argument but they represent only the views of two unnamed persons when H.B. 1091 was introduced. The legislature's intent when S.B. 6151 was passed is not addressed. We generally do not "turn to the comments of a single legislator to establish legislative history," nor do we rely on the public's comments before the legislative committees. *State v. Ramirez*, 140 Wn. App. 278, 288 n.7, 165 P.3d 61 (2007), *review denied*, 163 Wn.2d 1036 (2008); *see Louisiana-Pacific Corp. v. Asarco Inc.*, 131 Wn.2d 587, 599, 934 P.2d 685 (1997) (testimony by house staff member does not inform legislative intent).

> always allow prosecution if the teacher or person having the sexual relationship with the student does not give grades to the student.

S.B. REP. on Substitute H.B. 1091, at 2, 57th Leg., Reg. Sess. (Wash. 2001).

2. Governor's Veto of Original 2001 Bill

Governor Locke vetoed this "overly broad" bill because it criminalized sexual intercourse "even if both parties were teenagers, as long as one of them is a school employee." Noting that he "worked to strengthen our laws dealing with sex offenses against *minors*," he explained that the proposed bill language would apply to "sexual conduct with a student *between 16 and 18 years old*." To allay his concern that the bill's scope captured too many teenaged perpetrators, he suggested that lawmakers rewrite the bill "to permit prosecution only of those 18 years or older and who are not students in the same school." 1 Legislative Digest and History of Bills, 57th Leg., at 504 (1st ed. Wash. 2001) (emphasis added).

3. Interim, Post-veto Revision of Bill

Less than a week later, house members introduced a new bill following the governor's suggestion that school employees be "at least eighteen years old." H.B. 2262, at 1, 57th Leg., 1st Spec. Sess. (Wash. 2001). Thereafter, lawmakers changed the "at least eighteen" minimum age for school employees to a 60 month age difference between the employee and student. ENGROSSED H.B. 2262, at 1, 57th Leg., 1st Spec. Sess. (Wash. 2001). Lawmakers did not address the age of the student-victim in the second version of the bill. Ultimately, this bill died in committee. 2 LEGISLATIVE DIGEST AND HISTORY OF BILLS, 57th Leg., at 453 (2d ed., Wash. 2002).

Senators introduced third and fourth bills (S.B. 6288 and S.B. 6498) setting the maximim age of student-victims at 18 with a 60 month age differential, but one failed to get out of

committee and the second similarly died in the House. 2 LEGISLATIVE DIGEST AND HISTORY OF BILLS, 57th Leg., at 508-09, 590 (2d ed., Wash. 2002).

4. Current Statute

Finally, the sponsoring senators added RCW 9A.44.093(1)(b) as a rider to a successful omnibus sex offender bill, SUBSTITUTE S.B. 6151. It read then, as it does now:

> A person is guilty of sexual misconduct with a minor in the first degree when: . . . the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student.

2 Laws of 2001, ch. 12, § 357. The only mention of sexual misconduct with a minor in S.B. 6151's legislative history explains that RCW 9A.44.093(1)(b) was "modified to include a broader spectrum of *school employees*," namely, employees without direct authority over students. S.B. REP. on Third Engrossed Substitute S.B. 6151, at 6, 57th Leg., 2d Spec. Sess. (Wash. 2001) (emphasis added).

Lawmakers explained their intent in adopting RCW 9A.44.093(1)(b) in 2005, when they added subsection (c), which prohibits sexual intercourse between foster parents and foster children. In explaining previously adopted subsection (b), the Final Bill Report stated,

> Sexual intercourse . . . with *a minor who is 16- or 17-years-old* is not a crime, except for two situations. Sexual misconduct with a minor is a crime if the perpetrator is a school employee and the *minor* is a registered student of the school. Sexual misconduct with a 16- or 17-year-old is also a crime if the perpetrator is at least five years older, is not married to but is in a significant relationship to the minor, and abuses a supervisory position within that relationship to engage in or cause the minor to have sexual intercourse.

Final B. REP. on Substitute S.B. 5309, at 1, 59th Leg., Reg. Sess. (Wash. 2005) (emphasis added). In testimony on an earlier draft that added subsection (c), the Senate Bill Report Appendix A-17 expanded on the protection afforded to those under 18.

> The way that the crime of sexual misconduct with a minor is currently defined does not pick up on situations in which *adults* prey upon *teenagers* who are physically mature but who are not developmentally prepared to make sound judgments in *adult* situations. *Unless the perpetrator is a school employee and the victim is a student*, the law currently requires the victim to show that his or her compliance with the perpetrator's demand for sex was based on a threat or promise of a special benefit. It is hard to prove that compliance was predicated on a threat or a promise. It is also more likely that a perpetrator will gradually gain the trust of a *vulnerable youth* and then take advantage of that trusting relationship by seducing the *youth*. The law should protect *children under 18* from coaches, mentors, foster parents, and others who manipulate them into consenting to sexual contact or intercourse.

S.B. REP. on S.B. 5309, at 2, 59th Leg., Reg. Sess. (Wash. 2005) (emphasis added).

5. Analysis of Legislative Intent

Here, we are guided by several interpretive rules of legislative history. First, "[t]he Governor's veto statement is a part of legislative intent." *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 231, 989 P.2d 569 (1999). "In exercising the veto power, the Governor performs a legislative function and therefore must be considered to be acting as part of the Legislature." *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 213, 848 P.2d 1258 (1993). Second, "sequential drafts [of a bill] may be useful in determining legislative intent" where nothing negates the assumption that the legislature was aware of changes in

successive drafts. *State v. Komok*, 113 Wn.2d 810, 816 n.7, 783 P.2d 1061 (1989).[14] "[We] presume[] that members of the Legislature were aware of prior drafts of the bill at the time the . . . amendments to [the statute] were enacted." *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 753, 675 P.2d 592 (1984).

When Governor Locke vetoed the first bill, Substitute H.B. 1091, he determined that it defined student-victims as 16- and 17-years-old. 1 Legislative Digest and History of Bills, 57th Leg., at 504 (1st ed. Wash. 2001). The legislature never contradicted this definition; therefore, the governor's veto statement defining student-victims as 16- and 17-year-olds constitutes a clear indication of legislative intent and acceptance of this definition. Accordingly, the legislature carried forward this first bill's definition,[15] limiting student-victims to 16- and 17-year-olds in the bill it ultimately passed. *See* 2 Laws of 2001, ch. 12, § 357.

Third, "'while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure.'" *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (citations omitted) (quoting *Seatrain Shipbuilding Corp. v. Shell*

---

[14] We note that *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 451, 536 P.2d 157 (1975), states that "in the absence of any explanation for the changes, it is not a proper judicial function for us to speculate and attribute controlling meaning to an unexplained change that is just as likely to have occurred through happenstance." Our Supreme Court has distinguished *Hama Hama Co.* because there, the legislature passed a bill that was "replete with inconsistencies, errors and omissions. Thus the assumption of legislative awareness of successive drafts was negated." *Komok*, 113 Wn.2d at 816 n.7. In the instant case, nothing indicates that the legislature acted without full awareness of the bill's prior drafts.

[15] We note that the "under the age of eighteen" limitation was in several earlier drafts of the legislation, which did not pass into law. Thus, coupled with legislative acceptance of the governor's veto statement definition of student-victims as 16 and 17-year -olds, we conclude that the legislature removed the "under the age of eighteen" age limitation as mere surplusage. *See* 2 Laws of 2001, ch. 12, § 357.

Oil Co., 444 U.S. 572, 596, 100 S. Ct. 800, 63 L. Ed. 2d 36 (1980)).[16] Similarly here, the 2005 Final Bill Report made it clear that lawmakers viewed RCW 9A.44.093(1)(b) as criminalizing school employees' sexual contact only with "a minor who is 16- or 17-years-old." FINAL B. REP. on Substitute S.B. 5309, at 1, 59th Leg., Reg. Sess. (Wash. 2005). Thus, we conclude that the legislative history of RCW 9A.44.093(1)(b) clarifies that the legislature intended RCW 9A.44.093(1)(b) to criminalize only sexual misconduct between school employees and 16- and 17-year-old students.[17]

We hold that the trial court erred in denying Hirschfelder's *Knapstad* motion.[18] Because we decide this matter based on statutory interpretation, we do not address the parties' constitutional challenges to RCW 9A.44.093(1)(b).[19]

---

[16]In situations where lawmakers pass legislation actually declaring the intent of earlier laws, "'[s]ubsequent legislation . . . is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction.'" *In re Pers. Restraint of Jones*, 121 Wn. App. 859, 866, 88 P.3d 424 (2004) (quoting *Fed. Hous. Admin. v. The Darlington, Inc.*, 358 U.S. 84, 90, 79 S. Ct 141, 3 L. Ed. 2d 132 (1958)).

[17] Accordingly, we need not resort to use of the rule of lenity. *Stratton*, 130 Wn. App. at 764-65.

[18] The Office of the Superintendent of Public Instruction responds to a teacher's sexual contact with students with severe sanctions, namely, revoking the teacher's teaching certificate.

[19] "[I]f a case can be decided on nonconstitutional grounds, an appellate court should decline to consider the constitutional issues." *HJS Dev., Inc. v. Pierce County Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 469 n.74, 61 P.3d 1141 (2003). "A court will presume that a statute is constitutional and will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Stevenson*, 128 Wn. App. 179, 187, 114 P.3d 699 (2005) (quoting *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002)).

We further note that Division Three of this court held that RCW 9A.44.093(1)(b) passes constitutional muster and that the statute criminalizes sexual intercourse between school employees and students 18 and older. *State v. Clinkenbeard*, 130 Wn. App. 552, 560, 123 P.3d 872 (2005). Hirschfelder and WACDL argue that the constitutional discussion in *Clinkenbeard* is

COSTS

Hirschfelder asks for "costs . . . as allowed pursuant to RAP 14 and applicable case law." Br. of Appellant at 26. Under RAP 14.2, the party that substantially prevails on review is entitled to costs. Provided that Hirschfelder complies with RAP 18.1, a commissioner of this court may award him costs.

Because the legislature intended that RCW 9A.44.093(1)(b) only criminalize only the behavior of school employees who have sexual intercourse with minor students under the age of 18, we reverse the trial court's ruling on Hirschfelder's *Knapstad* motion and remand for dismissal of the charge against him.

Reversed and remanded for dismissal.

Van Deren, C. J.
VAN DEREN, C.J.

We concur:

Hunt, J.
HUNT, J.

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

"merely thoughtful dicta in light of the reversal on other grounds." Br. of Appellant at 18 n.10. WACDL states that "any discussion in *Clinkenbeard* of the constitutionality of RCW 9A.44.093(1)(b) was strictly *dicta*, since it was not necessary to reach the constitutional issues because the case was decided on the independent ground of sufficiency of the evidence." WACDL Amicus Br. at 13. We agree. Furthermore, *Clinkenbeard's* discussion of the age of the student-victim focuses on the reasonable protections afforded *children*, yet concludes that the legislature intended to criminalize sexual intercourse between school employees and all students, even those who are 18 and older. 130 Wn. App. at 564-65.

FILED
IN THE OFFICE
OF COUNTY CLERK
GRAYS HARBOR CO. WA.

'07 MAY 18 P12:47

CHERYL BROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, v. MATTHEW J. HIRSCHFELDER, DOB: 05/23/1973 Defendant.	No.: 07-1-294-7 **INFORMATION** **P.A. No.: CR 07-0296** **P.R. No.: HPD 06-H08638**

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant of the crime of SEXUAL MISCONDUCT WITH A MINOR IN THE FIRST DEGREE - SCHOOL EMPLOYEE, committed as follows:

That the above named defendant, Matthew J. Hirschfelder, on or about June 2, 2006, in Grays Harbor County, State of Washington, being a school employee of Hoquiam High School and being at least sixty months older than and not married to A.N.T., did engage in sexual intercourse with A.N.T., who was at that time 16 years of age or older and a registered student of the school;

CONTRARY TO RCW 9A.44.093(1)(b) and against the peace and dignity of the State of Washington.

DATED this 18th day of May, 2007.

H. STEWARD MENEFEE
Prosecuting Attorney for
Grays Harbor County

By: _____
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA # 35570

Appendix B-1

MMV/rmt

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6084

FILED
IN THE OFFICE
OF COUNTY CLERK
GRAYS HARBOR CO. WA.

'07 MAY 18 P12:49

CHERYL BROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON, Plaintiff, v. MATTHEW J. HIRSCHFELDER, Defendant.	No.: 07-1-294-7 **MOTION AND DECLARATION FOR ORDER FOR WARRANT OF ARREST** **LEA No.: HPD 06-H08638**

COMES NOW the State of Washington, plaintiff, and moves the Court for an order directing the issuance of a warrant for arrest of the defendant(s).

THIS MOTION is based upon the following declaration.

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

DECLARATION

I, Megan M. Valentine, hereby declare and say as follows:

That an Information was filed charging the defendant(s) with a criminal offense and probable cause exists for the issuance of an arrest warrant based upon the following facts which have been furnished in a police report submitted by the Hoquiam Police Department: Pursuant to

Appendix C-1

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6064

CrR 2.2(a)(3)(i), the DISCIS, DOL and DOC databases have been searched for the defendant's current address and the results of that search have been filed with the Clerk in this cause number.

On or about June 2, 2006, Hoquiam High School held a 1980's dance and book signing for the high school seniors. This party was held at the Hoquiam High School and attended by A.N.T. At the time A.N.T. was 18 years old and a registered student at Hoquiam High School. On June 2, 2006, Matthew J. Hirschfelder was thirty-three years old and employed by Hoquiam School District as the Choir teacher at Hoquiam High School.

In an interview with Sergeant Fretts on March 27, 2007, A.N.T. told Sergeant Fretts that on May 12, 2006, during Senior Recognition Night, she went to get a band aid out of the defendant's office and the defendant kissed her. A.N.T. said that during book signing night, which was a couple of weeks before school got out, on June 2, 2006, she went to the defendant's office to ask him to sign her book. According to A.N.T. they talked for a while and then the defendant kissed her. A.N.T. said he undressed her and they had intercourse on the floor in his office. According to A.N.T. after she graduated on June 16, 2006, she continued to see the defendant and had an ongoing intimate relationship with him which ended late in 2006.

In an interview with Sergeant Fretts on March 29, 2007, a classmate of A.N.T. said she noticed A.N.T. was missing from the book signing and dance on June 2, 2006 at approximately 10:30 p.m. According to this classmate, when she left around midnight she could see the lights on inside the choir room and the defendant's van parked near the door to the music room. The defendant was not a chaperone for the dance. A second classmate confirmed seeing the defendant's van parked in the lot on the night of the dance around midnight. That classmate said that the defendant had not been at the dance. This classmate also saw A.N.T.'s vehicle parked at the school around midnight. A third classmate of A.N.T. spoke with Sergeant Fretts on March 29, 2007 and told Fretts that she also noticed A.N.T. disappear from the dance on June 2, 2006

Appendix C-2

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6064

and could not locate her. These classmates all told Sergeant Fretts they were aware the defendant and A.N.T. had sex prior to graduation.

That the above acts occurred in Grays Harbor County, Washington That a warrant should issue.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18th day of May, 2007, at Montesano, Washington.

MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

MMV/jfa

Appendix C-3

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-5064

RCW 9A.44.093
Sexual misconduct with a minor in the first degree.

(1) A person is guilty of sexual misconduct with a minor in the first degree when: (a) The person has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with another person who is at least sixteen years old but less than eighteen years old and not married to the perpetrator, if the perpetrator is at least sixty months older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen to engage in sexual intercourse with the victim; (b) the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student; or (c) the person is a foster parent who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with his or her foster child who is at least sixteen.

(2) Sexual misconduct with a minor in the first degree is a class C felony.

(3) For the purposes of this section, "school employee" means an employee of a common school defined in RCW 28A.150.020, or a grade kindergarten through twelve employee of a private school under chapter 28A.195 RCW, who is not enrolled as a student of the common school or private school.

[2005 c 262 § 2; 2001 2nd sp.s. c 12 § 357; 1994 c 271 § 306; 1988 c 145 § 8.]

Notes:

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Intent -- 1994 c 271: See note following RCW 9A.44.010.

Purpose -- Severability -- 1994 c 271: See notes following RCW 9A.28.020.

Effective date -- Savings -- Application -- 1988 c 145: See notes following RCW 9A.44.010.

HOUSE BILL REPORT
HB 1091

As Reported by House Committee On:
Criminal Justice & Corrections

Title: An act relating to sexual misconduct with a minor.

Brief Description: Changing sexual misconduct laws with regard to school employees.

Sponsors: Representatives Lambert (co-prime sponsor), H. Sommers (co-prime sponsor), Miloscia, Cairnes, Schindler, Talcott and Mielke.

Brief History:
Committee Activity:
Criminal Justice & Corrections: 1/29/01, 2/7/01 [DPS].

Brief Summary of Substitute Bill

- Changes the elements of first and second degree sexual misconduct with a minor as it applies in the case of school employees and students.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Ballasiotes, Republican Co-Chair; O'Brien, Democratic Co-Chair; Ahern, Republican Vice Chair; Lovick, Democratic Vice Chair; Cairnes, Kagi, Kirby and Morell.

Staff: Jean Ann Quinn (786-7310).

Background:

Sexual misconduct with a minor is committed if the victim is 16 or 17 years old and the perpetrator is at least five years older than the victim, is in a significant relationship to the victim, and abuses a supervisory position within that relationship to engage in sexual intercourse (first degree) or sexual contact (second degree) with the victim. The crime is also committed if the perpetrator causes the minor to have sexual intercourse or sexual contact with another minor. It is not a crime if the child and the perpetrator are married.

Sexual misconduct with a minor in the first degree is a class C felony, ranked at seriousness level V, and in the second degree is a gross misdemeanor.

The term "significant relationship" as it applies in this context means a situation in which the perpetrator is a person who is responsible for providing education, health, welfare, or organized recreational activities for minors, or who supervises minors in the course of his or her employment.

The term "abuse of a supervisory position" means a direct or indirect threat or promise to use authority to the detriment or benefit of a minor.

Summary of Substitute Bill:

The crime of sexual misconduct with a minor is also committed if a school employee has, or knowingly causes another minor to have, sexual intercourse (first degree) or sexual contact (second degree) with a registered student of the school who is at least 16 years old and not married to the school employee. The term school employee– is defined to mean an employee of a public or private school, grades kindergarten through 12.

Substitute Bill Compared to Original Bill:

The substitute bill eliminates the requirement that the student be under the age of 18, thus covering registered students over the age of 18 who are completing independent education plans.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Original bill) The current statute requires that there be an actual threat or promise to use the person's authority to the detriment or benefit of the student in order for the crime to be prosecuted. The bill will close that loophole, and allow cases to be prosecuted where there isn't an abuse of a supervisory position because there isn't a threat or the employee is not in a supervisory relationship with the student. This occurs, for example, when the employee is not the student's teacher, but a counselor or coach. The bill is narrowly drawn, and would not apply outside the school setting. It addresses concerns that are raised due to the unique and potentially coercive relationships that can occur between students and school employees.

Testimony Against: None.

Testified: (In support) Representative Lambert, co-prime sponsor; Tom McBride, Washington Association of Prosecuting Attorneys; and Suzanne Brown, Washington Coalition of Sexual Assault Programs.

VETO MESSAGE ON HB 1091-S

May 15, 2001

To the Honorable Speakers and Members,
The House of Representatives of the State of Washington
Ladies and Gentlemen:

I am returning herewith, without my approval, Substitute House Bill No. 1091 entitled:

"AN ACT Relating to sexual misconduct with a minor;"

Substitute House Bill No. 1091 would have made it a felony for any school employee to engage in sexual conduct with a student between 16 and 18 years old. Such conduct is already a felony if the perpetrator is at least five years older and abuses a supervisory position, such as that of a teacher or coach, by making threats or promises to the victim. The bill was intended to remove the requirement that threats or promises be made.

However, the bill is overly broad. It would allow felony prosecution even if both parties were teenagers, as long as one of them is a school employee. The term "employee" could include a student who is a part-time tutor, food service or maintenance worker. For example, there are high school students who are Washington Reading Corps tutors and are paid by their local school districts. Those students could be subject to prosecution if they have consensual sex with a classmate of approximately the same age. Such a person could be imprisoned and required to register as a sex offender after release.

I do not condone sexual activity among teenagers, but this bill is simply too broad.

As a legislator, I worked to strengthen our laws dealing with sex offenses against minors. This bill should be written to permit prosecution only of those 18 years or older and who are not students in the same school. Accordingly, I have forwarded suggested legislation to the prime sponsor of this bill.

For these reasons I have vetoed Substitute House Bill No. 1091 in its entirety.

Respectfully submitted,
Gary Locke
Governor

Washington State Constitution

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

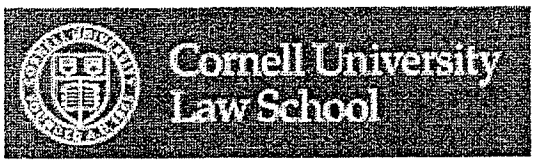
SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [**AMENDMENT 88,** 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

Amendment 34 (1957) -- Art. 1 Section 11 RELIGIOUS FREEDOM -- *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment:* Provided, however, *That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 34, 1957 Senate Joint Resolution No. 14, p 1299. Approved November 4, 1958.]



United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

- Previous Amendment --Next Amendment
- Table of Articles and Amendments
- Overview of Full Constitution

Appendix G-1

conservation or more efficient use of energy in such structures or equipment. Except as provided in section 7 of this Article, an appropriate charge back shall be made for such extension of public moneys or credit and the same shall be a lien against the structure benefited or a security interest in the equipment benefited. Any financing authorized by this article shall only be used for conservation purposes in existing structures and shall not be used for any purpose which results in a conversion from one energy source to another. [AMENDMENT 82, 1988 House Joint Resolution No. 4223, p 1552. Approved November 8, 1988.]

Amendment 70 (1979) -- Art. 8 Section 10 RESIDENTIAL ENERGY CONSERVATION -- *Notwithstanding the provisions of section 7 of this Article, until January 1, 1990 any county, city, town, quasi municipal corporation, municipal corporation, or political subdivision of the state which is engaged in the sale or distribution of energy may, as authorized by the legislature, use public moneys or credit derived from operating revenues from the sale of energy to assist the owners of residential structures in financing the acquisition and installation of materials and equipment for the conservation or more efficient use of energy in such structures. Except as provided in section 7 of this Article, an appropriate charge back shall be made for such extension of public moneys or credit and the same shall be a lien against the residential structure benefited. Except as to contracts entered into prior thereto, this amendment to the state Constitution shall be null and void as of January 1, 1990 and shall have no further force or effect after that date.* [AMENDMENT 70, Substitute Senate Joint Resolution No. 120, p 2288. Approved November 6, 1979.]

SECTION 11 AGRICULTURAL COMMODITY ASSESSMENTS --DEVELOPMENT, PROMOTION, AND HOSTING. The use of agricultural commodity assessments by agricultural commodity commissions in such manner as may be prescribed by the legislature for agricultural development or trade promotion and promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift within the provisions of section 5 of this article. [**AMENDMENT 76,** 1985 House Joint Resolution No. 42, p 2402. Approved November 5, 1985.]

ARTICLE IX
EDUCATION

SECTION 1 PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

SECTION 2 PUBLIC SCHOOL SYSTEM. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

SECTION 3 FUNDS FOR SUPPORT. The principal of the common school fund as the same existed on June 30, 1965, shall remain permanent and irreducible. The said fund shall consist of the principal amount thereof existing on June 30, 1965, and such additions thereto as may be derived after June 30, 1965, from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state when the purpose of the grant is not specified, or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of stone, minerals, or property other than timber and other crops from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating stone, minerals or property other than timber and other crops from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state, which shall be sold by the United States subsequent to the admission of the state into the Union as approved by section 13 of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been, and hereafter may be granted to the state for the support of common schools. The legislature may make further provisions for enlarging said fund.
There is hereby established the common school construction fund to be used exclusively for the purpose of financing the construction of facilities for the common schools. The sources of said fund shall be: (1) Those proceeds derived from the sale or appropriation of timber and other crops from school and state lands subsequent to June 30, 1965, other than those granted for specific purposes; (2) the interest accruing on said permanent common school fund from and after July 1, 1967, together with all rentals and other revenues derived therefrom and from lands and other property devoted to the permanent common school fund from and after July 1, 1967; and (3) such other sources as the legislature may direct. That portion of the common school construction fund derived from interest on the permanent common school fund may be used to retire such bonds as may be authorized by law for the purpose of financing the construction of facilities for the common schools.
The interest accruing on the permanent common school fund together with all rentals and other revenues accruing thereto pursuant to subsection (2) of this section during the period after the effective date of this amendment and prior to July 1, 1967, shall be exclusively applied to the current use of the common schools.
To the extent that the moneys in the common school construction fund are in excess of the amount necessary to allow fulfillment of the purpose of said fund, the excess shall be available for deposit to the credit of the permanent common school fund or available for the current use of the common schools, as the legislature may direct. [**AMENDMENT 43,** 1965 ex.s. Senate Joint Resolution No. 22, part 1, p 2817. Approved November 8, 1966.]

Original text -- Art. 9 Section 3 FUNDS FOR SUPPORT -- *The principal of the common school fund shall remain permanent and irreducible.*

The said fund shall be derived from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state when the purpose of the grant is not specified, or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, minerals, or other property from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating timber, stone, minerals or other property from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state, which shall be sold by the United States subsequent to the admission of the state into the Union as approved by section 13 of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been, and hereafter may be granted to the state for the support of common schools. The legislature may make further provisions for enlarging said fund. The interest accruing on said fund together with all rentals and other revenues derived therefrom and from lands and other property devoted to the common school fund shall be exclusively applied to the current use of the common schools.

SECTION 4 SECTARIAN CONTROL OR INFLUENCE PROHIBITED. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

SECTION 5 LOSS OF PERMANENT FUND TO BECOME STATE DEBT. All losses to the permanent common school or any other state educational fund, which shall be occasioned by defalcation, mismanagement or fraud of the agents or officers controlling or managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state in favor of the particular fund sustaining such loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized and limited elsewhere in this Constitution.

Investment of permanent school fund: Art. 16 Section 5.

ARTICLE X
MILITIA

SECTION 1 WHO LIABLE TO MILITARY DUTY. All able-bodied male citizens of this state between the ages of eighteen (18) and forty-five (45) years except such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty.

SECTION 2 ORGANIZATION -- DISCIPLINE -- OFFICERS -- POWER TO CALL OUT. The legislature shall provide by law for organizing and disciplining the militia in such manner as it may deem expedient, not incompatible with the Constitution and laws of the United States. Officers of the militia shall be elected or appointed in such manner as the legislature shall from time to time direct and shall be commissioned by the governor. The governor shall have power to call forth the militia to execute the laws of the state to suppress insurrections and repel invasions.

SECTION 3 SOLDIERS' HOME. The legislature shall provide by law for the maintenance of a soldiers' home for honorably discharged Union soldiers, sailors, marines and members of the state militia disabled while in the line of duty and who are *bona fide* citizens of the state.

SECTION 4 PUBLIC ARMS. The legislature shall provide by law, for the protection and safe keeping of the public arms.

SECTION 5 PRIVILEGE FROM ARREST. The militia shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at musters and elections of officers, and in going to and returning from the same.

SECTION 6 EXEMPTION FROM MILITARY DUTY. No person or persons, having conscientious scruples against bearing arms, shall be compelled to do militia duty in time of peace: *Provided,* such person or persons shall pay an equivalent for such exemption.

ARTICLE XI
COUNTY, CITY, AND TOWNSHIP ORGANIZATION

SECTION 1 EXISTING COUNTIES RECOGNIZED. The several counties of the Territory of Washington existing at the time of the adoption of this Constitution are hereby recognized as legal subdivisions of this state.

SECTION 2 COUNTY SEATS -- LOCATION AND REMOVAL. No county seat shall be removed unless three-fifths of the qualified electors of the county, voting on the proposition at a general election shall vote in favor of such removal, and three-fifths of all votes cast on the proposition shall be required to relocate a county seat. A proposition of removal shall not be submitted in the same county more than once in four years.

Governmental continuity during emergency periods: Art. 2 Section 42.

Westlaw

123 P.3d 872
130 Wash.App. 552, 123 P.3d 872, 203 Ed. Law Rep. 850
(Cite as: 130 Wash.App. 552, 123 P.3d 872)

Court of Appeals of Washington, Division 3.
STATE of Washington, Respondent,
v.
Dennis A. CLINKENBEARD, Appellant.
No. 23189-5-III.

Nov. 29, 2005.

Background: School bus driver was convicted in the Superior Court of Okanogan County, Jack G. Burchard, J., of violation of statute making it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student, even if student is over 18. Defendant appealed.

Holdings: The Court of Appeals, Thompson, J. Pro Tem., held that:
(1) statute was not facially unconstitutional;
(2) statute as applied did not violate right to substantive due process;
(3) statute did not violate equal protection, and
(4) use of hearsay impeach evidence to convict was reversible error.

Reversed.

West Headnotes

[1] Rape 321 ⚿4

321 Rape
321I Offenses and Responsibility Therefor
321k4 k. Persons on Whom Offense May Be Committed. Most Cited Cases
Statute making it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student, can be applied to criminally prosecute a public school employee who has sexual intercourse with a student who is legally an adult over the age of 18 and does not require the school employee to be in a position of authority or supervision over the student. West's RCWA 9A.44.093(1)(b).

[2] Criminal Law 110 ⚿1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases
The interpretation of a statute and the determination of whether a statute violates the United States Constitution are issues of law that are reviewed de novo.

[3] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))

Constitutional Law 92 ⚿1004

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1004 k. Proof Beyond a Reasonable Doubt. Most Cited Cases
(Formerly 92k48(3))

Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited (Formerly 92k48(1))
Where the constitutionality of a statute is challenged, the statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.

[4] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))
Courts are generally hesitant to strike a duly enacted statute unless fully convinced that the statute violated the constitution, and if possible, a statute should be construed as constitutional.

[5] Constitutional Law 92 ⚿656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial Invalidity. Most Cited Cases
(Formerly 92k38)
In order to make a facial challenge to a statute, it must be shown that there is no set of circumstances in which the statute, as currently written, can be constitutionally applied.

[6] Statutes 361 ⚿63

361 Statutes
361I Enactment, Requisites, and Validity in General
361k63 k. Effect of Total Invalidity. Most Cited Cases
The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative.

[7] Constitutional Law 92 ⚿1447

92 Constitutional Law
92XVI Freedom of Association
92k1447 k. Education in General. Most Cited Cases
(Formerly 92k82(12))

Rape 321 ⚿2

321 Rape
321I Offenses and Responsibility Therefor
321k2 k. Statutory Provisions. Most Cited Cases
Assuming that there is a fundamental right to intimate association between any and all consenting adults, statute making it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student, is not facially unconstitutional, since the statute also applies to those students who are at least 16 but who are not yet 18, and are thus not yet legal adults. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 ⚿657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as Applied. Most Cited Cases
(Formerly 92k38)
An as-applied challenge to the constitutional validity of a statute is characterized by a party's allega-

tion that application of the statute in the specific context of the party's actions is unconstitutional.

[9] Statutes 361 ⚿64(1)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(1) k. In General. Most Cited Cases
Holding a statute unconstitutional as applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated.

[10] Constitutional Law 92 ⚿1238

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1237 Sex and Procreation
92k1238 k. In General. Most Cited
(Formerly 92k82(10))

Constitutional Law 92 ⚿1442

92 Constitutional Law
92XVI Freedom of Association
92k1442 k. Intimate Association; Dating Relationships in General. Most Cited Cases
(Formerly 92k82(10))
Two potential fundamental rights are implicated in the exercise of personal liberty to engage in private, adult, consensual sexual conduct: the right to freedom of association or intimate association, and the right to privacy. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases
(Formerly 92k91)
The term "freedom of association" protected by the Constitution refers to the choice to enter into and maintain certain intimate human relationships, and is protected against undue intrusion by the state because this freedom is a fundamental element of personal liberty; additionally, the formation and preservation of intimate personal relationships is afforded a substantial measure of protection from unjustified interference from the state. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ⚿1238

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1237 Sex and Procreation
92k1238 k. In General. Most Cited
(Formerly 92k82(10), 92k82(7))

Constitutional Law 92 ⚿1248

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1247 Family Law; Marriage
92k1248 k. In General. Most Cited
(Formerly 92k82(10), 92k82(7))

Constitutional Law 92 ⚿4450

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)22 Privacy and Sexual Matters
92k4450 k. In General. Most Cited
(Formerly 92k4382, 92k274(5))
There is an individual right to privacy which, although not expressly guaranteed in the United States Constitution, is implicitly one aspect of the liberty that is protected by the due process clause of the Fourteenth Amendment, or as one of the "penumbras" of the express guarantees of the Bill of Rights; the right to privacy also includes the

right of personal autonomy, particularly in matters pertaining to marriage, procreation, contraception, family relationships, and child-rearing. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⚿1094

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1094 k. Sex and Procreation. Most Cited Cases
(Formerly 92k82(10))
United States Supreme Court decision, *Lawrence v. Texas,* which restricts the degree to which government may regulate private, adult, consensual sexual behavior, did not establish that this behavior rises to the level of a fundamental right; moreover, even if decision did establish that heightened review was required in some cases of private, consensual, adult sexual activity, the decision specifically points out that these protections do not apply to cases that may involve minors, those who are vulnerable to coercion, and those who are situated in relationships where consent may not easily be refused. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 92 ⚿3901

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3901 k. Levels of Scrutiny; Strict or Heightened Scrutiny. Most Cited Cases
(Formerly 92k255(1))
The substantive component of the Fourteenth Amendment's due process clause forbids the government to infringe on fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. U.S.C.A. Const.Amend. 14.

[15] Constitutional Law 92 ⚿3895

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3895 k. Reasonableness, Rationality, and Relationship to Object. Most Cited Cases
(Formerly 92k251.3)
Generally, under substantive due process, when there is no alleged violation of a fundamental right, the challenged state action need only be rationally related to a legitimate government interest, and a defendant challenging the constitutionality of such statute must show that the law is so unrelated to the achievement of a legitimate purpose that the law is arbitrary or obsolete. U.S.C.A. Const.Amend. 14.

[16] States 360 ⚿21(2)

360 States
360II Government and Officers
360k21 Government Powers
360k21(2) k. Police Power. Most Cited Cases
(Formerly 92k1066, 92k81)
The police powers of government allow the legislature to enact laws in the interests of the people, and the scope of that power is broad and encompasses measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.

[17] Constitutional Law 92 ⚿2491

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2491 k. Necessity. Most Cited Cases
(Formerly 92k70.3(8))

States 360 ⚿21(2)

360 States
360II Government and Officers
360k21 Government Powers
360k21(2) k. Police Power. Most Cited Cases
(Formerly 92k1066, 92k81)

In legislating for the general health, safety, and welfare of the people, certain constraints on individual freedom have traditionally been imposed by the state, and it is not the proper function of the courts to substitute their judgment for that of the legislature with respect to the necessity of these constraints.

[18] Constitutional Law 92 ⇨1238

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1237 Sex and Procreation
92k1238 k. In General. Most Cited
(Formerly 92k82(10))

Constitutional Law 92 ⇨1264(1)

92 Constitutional Law
92XI Right to Privacy
92XI(B) Particular Issues and Applications
92k1262 Education
92k1264 Students
92k1264(1) k. In General. Most Cited Cases
(Formerly 92k82(12))

The state's interest in protecting children from sexual exploitation and abuse is a compelling government objective that justifies at least some regulation of sexual conduct, even where it infringes on the right to privacy, and courts show even greater deference to the determinations of the state in the context of education. U.S.C.A. Const.Amend. 14.

[19] Constitutional Law 92 ⇨4509(23)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(23) k. Sex Offenses, Incest, and Prostitution. Most Cited Cases
(Formerly 92k258(5))

Rape 321 ⇨2

321 Rape
321I Offenses and Responsibility Therefor
321k2 k. Statutory Provisions. Most Cited Cases

Because statute making it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student was not wholly irrelevant to the legitimate state goal of preventing the exploitation of students, and therefore was not arbitrary, it did not violate right to substantive due process of school bus driver who came within its terms. U.S.C.A. Const.Amend. 14; West's RCWA 9A.44.093(1)(b).

[20] Constitutional Law 92 ⇨3041

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3041 k. Similarly Situated Persons; Like Circumstances. Most Cited Cases
(Formerly 92k211(1))

The equal protection clauses of the federal and state constitutions require that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[21] Constitutional Law 92 ⚿3062

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3059 Heightened Levels of Scru- tiny
92k3062 k. Strict Scrutiny and Compelling Interest in General. Most Cited Cases
(Formerly 92k213.1(2), 92k213.1(1))

Strict scrutiny under equal protection applies when a statutory classification affects a suspect class or a fundamental right, and under the strict scrutiny test, a law may be upheld only if it is shown to be necessary for a compelling state interest. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[22] Constitutional Law 92 ⚿3061

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3059 Heightened Levels of Scru- tiny
92k3061 k. Intermediate Scrutiny in General. Most Cited Cases
(Formerly 92k213.1(2), 92k213.1(1))

The intermediate scrutiny test under equal protection may apply in certain limited circumstances where the statutory classification affects an important right and applies to a semi-suspect class not accountable for its status; under this test, the law must fairly be viewed as furthering a substantial interest of the state. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[23] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))

The rational basis test under equal protection applies when the challenged statutory classification involves neither a fundamental right nor a suspect classification; under the rational basis test, the law is subject to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[24] Constitutional Law 92 ⚿3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and Other Written Regulations and Rules. Most Cited Cases
(Formerly 92k213.1(2))

A legislative distinction will survive the rational basis test under equal protection if (1) all members of the class are treated alike, (2) there is a rational basis for treating differently those within and outside of the class, and (3) the classification is rationally related to the purpose of the legislation. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[25] Constitutional Law 92 ⚿3106

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)1 Age
92k3106 k. Criminal Law. Most Cited Cases
(Formerly 92k250.1(2))

Rape 321 ⚿2

321 Rape
321I Offenses and Responsibility Therefor
321k2 k. Statutory Provisions. Most Cited Cases
Statute making it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student did not violate equal protection as applied to school bus driver coming within its terms, given the important state goals of providing a safe school environment for children and preventing the sexual exploitation of children; distinction had a basis that was rationally related to those important and compelling government purposes. U.S.C.A. Const.Amend. 14; West's RCWA 9A.44.093(1)(b).

[26] Rape 321 ⚿52(2)

321 Rape
321II Prosecution
321II(B) Evidence
321k50 Weight and Sufficiency
321k52 Female Under Age of Consent
321k52(2) k. Carnal Knowledge. Most Cited Cases
The evidence was insufficient to convict school bus driver of sexual misconduct with a minor, where the state used impeachment hearsay evidence as substantive evidence of guilt, and that was the sole evidence of the essential element of sexual intercourse between the defendant and the girl. West's RCWA 9A.44.093(1)(b).

[27] Criminal Law 110 ⚿1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In General. Most Cited Cases
(Formerly 110k1153(1))
Court of Appeals reviews a trial court's rulings on the admissibility of evidence under an abuse of discretion standard, which exists when the trial court's exercise of discretion is manifestly unreasonable or is based upon untenable grounds.

[28] Criminal Law 110 ⚿419(1)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(1) k. In General. Most Cited Cases
An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, even if the statement was made and acknowledged by someone who is an in-court witness at trial. ER 802.

[29] Witnesses 410 ⚿380(5.1)

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Wit- ness
410k380 Witnesses Who May Be Impeached by Inconsistent Statements
410k380(5) Inconsistent Statements of One's Own Witness
410k380(5.1) k. In General. Most Cited Cases
The State is allowed to impeach its own witness using a prior inconsistent statement even if the in-court witness acknowledges that the prior inconsistent statement was made.

[30] Constitutional Law 92 ⚿4768

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)8 Appeal or Other Proceedings for Review
92k4768 k. Record. Most Cited Cases
(Formerly 92k271)
While normally the onus is on the appellant to perfect the trial record, a criminal defendant also has a

due process right to a record of sufficient completeness for review of errors. U.S.C.A. Const.Amend. 14; West's RCWA Const. Art. 1, § 12.

[31] Criminal Law 110 ⇐1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

Criminal Law 110 ⇐1159.2(7)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) k. Reasonable Doubt. Most Cited Cases
Evidence is sufficient to support a conviction if, when taken in the light most favorable to the state, the evidence would allow any rational trier of fact to find the elements of the crime beyond a reasonable doubt.

[32] Criminal Law 110 ⇐1144.13(4)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(4) k. Evidence Accepted as True. Most Cited Cases

Criminal Law 110 ⇐1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or Deductions from Evidence. Most Cited Cases

Criminal Law 110 ⇐1159.2(5)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(5) k. Substantial Evidence. Most Cited Cases
A claim of insufficiency of the evidence admits the truth of all of the State's evidence and all of the inferences that can reasonably be drawn from it; however, there must be at least substantial evidence that supports the elements of the crime charged.

[33] Double Jeopardy 135H ⇐109

135H Double Jeopardy
135HIV Effect of Proceedings After Attachment of Jeopardy
135Hk107 Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial
135Hk109 k. Sufficiency or Insufficiency of Evidence. Most Cited Cases
A defendant whose conviction is reversed due to insufficient evidence cannot be retried.

****875** Robert C. Van Siclen, Michael J. Kelly, Van Siclen, Stocks & Firkins, Auburn, WA, for Appellant.
Karl F. Sloan, Okanogan County Prosecuting Attorney, Okanogan, WA, for Respondent.

THOMPSON, J. Pro Tem.[FN*]

FN* Judge Philip J. Thompson is serving

as judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

*557 ¶ 1 Dennis Clinkenbeard appeals his conviction for sexual misconduct with a minor in the first degree. He contends that the pertinent statute, RCW 9A.44.093(1)(b), is unconstitutional on its face and as applied in his case. He argues that it violates substantive due process and equal protection guarantees because it criminalizes consensual, private, adult sexual conduct. He also asserts that the trial court erred when it allowed impeachment testimony to be used in the State's closing argument as substantive evidence of guilt. We reverse.

FACTS

¶ 2 This case arises out of a sexual relationship between an 18-year-old high school student, M.Q., and Dennis Clinkenbeard, a 62-year-old bus driver. While the evidence at trial indicated the sexual component to their relationship *558 did not begin until after M.Q. turned 18, it also showed the romantic relationship began when M.Q. was only 12.

¶ 3 Mr. **Clinkenbeard** was employed as a bus driver for the Grand Coulee School District from 1997 until 2003. M.Q. was in the **876 fifth grade and was approximately 12 years old at the time that Mr. **Clinkenbeard** first began to drive her school bus. Mr. **Clinkenbeard** is 44 years older than M.Q.

¶ 4 Mr. **Clinkenbeard** paid special attention to M.Q. as her bus driver. He would give M.Q. personal notes and testimony at trial indicated that he placed his hands on her buttocks on more than one occasion. Once M.Q. became older and no longer rode on Mr. **Clinkenbeard's** bus route, the two passed notes through M.Q.'s younger brother. There were several occasions, however, when Mr. **Clinkenbeard** drove the bus for school events that M.Q. attended. During one of these trips, a friend of M.Q.'s witnessed the two kissing on the bus. When M.Q. was in ninth grade, she began taking music lessons from Mr. Clinkenbeard. The two talked frequently over the phone.

¶ 5 Mr. Clinkenbeard divorced his wife during M.Q.'s senior year of high school, shortly after M.Q. turned 18. He then moved his trailer next to M.Q.'s house. M.Q. told a friend that she and Mr. Clinkenbeard had had sex on more than one occasion. However, she said that they did not have sex until May 2003, which was after M.Q. had turned 18 but before she had graduated from high school. Neither M.Q. nor Mr. **Clinkenbeard** ever made any statements or otherwise indicated that they had sex prior to M.Q. turning 18.

¶ 6 Based on reports from several sources of an improper relationship between Mr. **Clinkenbeard** and M.Q., Sergeant Larry Hall and Officer Joseph Lauseng served a search warrant on M.Q.'s residence on June 4, 2003. In their search of her room, the officers uncovered several items relating to M.Q.'s relationship with Mr. **Clinkenbeard**, including gifts, photos, and personal letters.

*559 ¶ 7 Officer Lauseng also questioned M.Q. about her relationship with Mr. **Clinkenbeard**. Specifically, the officers tried to find out if the two had ever been intimate or had sex. Sergeant Hall asked if M.Q. wanted him to tell her mom that M.Q. and Mr. **Clinkenbeard** were sexually involved. M.Q. responded that, "[n]ews like this, a mother should hear from her daughter." Report of Proceedings (RP) I at 125.

¶ 8 At trial, M.Q. explained that her statement was not an admission that she and Mr. Clinkenbeard had sex, but was merely an attempt to end the line of questioning from Sergeant Hall. When asked directly if she and Mr. Clinkenbeard had sex, M.Q. stated, "No." RP II at 77.

¶ 9 Mr. Clinkenbeard was charged on June 9, 2003, with two counts of child molestation in the second degree, one count of sexual misconduct in the first degree, and one count of communication with a minor for immoral purposes. He was ultimately tried on the molestation and sexual misconduct

charges only. A jury found Mr. Clinkenbeard not guilty of the two counts of molestation, but convicted him of sexual misconduct with a minor in the first degree.

ANALYSIS

I. DUE PROCESS AND EQUAL PROTECTION CHALLENGES TO RCW 9A.44.093(1)(b)

¶ 10 Mr. Clinkenbeard contends that the United States Supreme Court decision in *Lawrence v. Texas* has established that the right of consenting adults to engage in private sexual behavior is protected under the fundamental rights of privacy and intimate association. *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). He further asserts that RCW 9A.44.093(1)(b) is unconstitutional on its face and as applied in his case because this statute intrudes on the fundamental rights of privacy and intimate association and is not necessary to serve a compelling state interest.

[1] ***560** ¶ 11RCW 9A.44.093(1)(b) makes it a class C felony for any school employee to have sexual intercourse with a registered student of that school who is at least 16 years old if there is an age difference of five years or more between the employee and the student. By its terms, this statute can be applied to criminally prosecute a public school employee who has sexual intercourse with a student who is legally an adult (over the age of 18) and does not require the school employee to be in a position of authority or supervision over the students.

****877** [2][3][4] ¶ 12"The interpretation of a statute and the determination of whether a statute violates the United States Constitution are issues of law that are reviewed de novo." *In re Parentage of C.A.M.A.,* 154 Wash.2d 52, 57, 109 P.3d 405 (2005). Where the constitutionality of a statute is challenged, the statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Tunstall v. Bergeson,* 141 Wash.2d 201, 220, 5 P.3d 691 (2000). Courts are generally hesitant to strike a duly enacted statute unless fully convinced that the statute violated the constitution. *Id.* If possible, a statute should be construed as constitutional. *State v. Farmer,* 116 Wash.2d 414, 419-20, 805 P.2d 200, 812 P.2d 858 (1991).

A. Facial constitutionality of RCW 9A.44.093(1)(b)

[5][6] ¶ 13 Mr. Clinkenbeard asserts that RCW 9A.44.093(1)(b) is unconstitutional on its face. However, in order to make a facial challenge to this statute, he must show that there is no set of circumstances in which the statute, as currently written, can be constitutionally applied. *City of Redmond v. Moore,* 151 Wash.2d 664, 669, 91 P.3d 875 (2004). "The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative." *Id.*

[7] ¶ 14 Mr. Clinkenbeard cannot show that RCW 9A.44.093(1)(b) is facially unconstitutional since he cannot show that there is no set of circumstances in which it ***561** can be constitutionally applied. The premise behind Mr. Clinkenbeard's asserted constitutional violation is that *Lawrence* established a fundamental right to "intimate association" that includes all private, consensual sexual conduct between adults. Even assuming that there is a fundamental right to intimate association between any and all consenting *adults,* the statute at issue also applies to those students who are at least 16 but who are not yet 18. These students are not yet legal adults. Because the decision in *Lawrence* is very clearly limited to consensual adult sexual behavior, and does not recognize any such fundamental right in minors, there is no constitutional violation where the set of circumstances includes intercourse between a public school employee and a minor.[FN1]

FN1. The court in *Lawrence* makes clear that nothing in its decision affects the ability of states to regulate sexual conduct with minors. *Lawrence,* 539 U.S. at 578, 123

S.Ct. 2472.

B. Constitutionality of RCW 9A.44.093(1)(b) as applied in this case

[8][9] ¶ 15 Mr. Clinkenbeard argues that RCW 9A.44.093(1)(b), as applied in his case, violated his rights to due process and equal protection under the law. An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions is unconstitutional. *Moore,* 151 Wash.2d at 668-69, 91 P.3d 875. Holding a statute unconstitutional as applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated. *Id.* at 669, 91 P.3d 875. A statute is presumed constitutional and the party challenging the statute has the burden of proving its unconstitutionality beyond a reasonable doubt. *Farmer,* 116 Wash.2d at 419, 805 P.2d 200.

1. Lawrence v. Texas and standard of review

[10] ¶ 16 Two potential fundamental rights are implicated in the exercise of personal liberty to engage in private, adult, consensual sexual conduct: the right to freedom of association or intimate association, and the right to privacy.

[11] ¶ 17 The term "freedom of association" refers to the choice to enter into and maintain certain intimate human ***562** relationships. *Roberts v. United States Jaycees,* 468 U.S. 609, 617-18, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). This choice is protected against undue intrusion by the state because this freedom is a fundamental element of personal liberty. *Id.* at 618, 104 S.Ct. 3244. Additionally, the formation and preservation of intimate personal relationships is afforded a substantial measure of ****878** protection from unjustified interference from the state. *Id.*

[12] ¶ 18 There is also an individual right to privacy which, although not expressly guaranteed in the United States Constitution, is implicitly one aspect of the liberty that is protected by the due process clause of the Fourteenth Amendment, or as one of the "penumbras" of the express guarantees of the Bill of Rights. *See Carey v. Population Servs. Int'l,* 431 U.S. 678, 684, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Griswold v. Connecticut,* 381 U.S. 479, 484-85, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). This right to privacy also includes the right of personal autonomy, particularly in matters pertaining to marriage, procreation, contraception, family relationships, and child-rearing. *Bedford v. Sugarman,* 112 Wash.2d 500, 513, 772 P.2d 486 (1989).

¶ 19 The Court in *Lawrence* invalidated a Texas statute that made it a misdemeanor offense for two persons of the same sex to engage in certain intimate conduct. *Lawrence,* 539 U.S. at 563-64, 123 S.Ct. 2472. Specifically, the Court determined that the statute violated the guarantees of substantive due process because it regulated a "personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Id.* at 567, 123 S.Ct. 2472.

¶ 20 The *Lawrence* Court also looked to an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572, 123 S.Ct. 2472. This implies that part of the substantive protections of due process includes personal decisions relating to sexual practices either in the bedroom or in other private places.

***563** ¶ 21 The Court also noted that the state and courts should avoid interfering in private relationships, "absent injury to a person or abuse of an institution the law protects." *Id.* at 567, 123 S.Ct. 2472. Therefore, the decision in *Lawrence* may also be fairly said to restrict what courts should consider a legitimate state interest when the conduct in question is private, consensual sexual activity between adults.

¶ 22 Additionally, the *Lawrence* opinion does not employ a fundamental rights analysis, but instead applied a rational basis review to the challenged statute. *Id.* at 578, 123 S.Ct. 2472. The basis of the court's decision was that the statute at issue, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* This application of rational basis review implicitly asserts that the right of consenting adults to engage in private, sexual behavior does *not* rise to the level of a fundamental right.

[13] ¶ 23 While the decision in *Lawrence* restricts the degree to which government may regulate private, adult, consensual sexual behavior, the court did not establish that this behavior rises to the level of a fundamental right. Moreover, even if *Lawrence* did establish that heightened review was required in some cases of private, consensual, adult sexual activity, the decision specifically points out that these protections do not apply to cases that may involve minors, those who are vulnerable to coercion, and those who are situated in relationships where consent may not easily be refused. *Id.*RCW 9A.44.093(1)(b) addresses conduct where all three potential situations are present, as it prevents much older adults from abusing their access to students in order to exploit these students sexually.

¶ 24 Because *Lawrence v. Texas* does not establish a fundamental right to all consensual adult sexual conduct, we apply a rational basis review to Mr. Clinkenbeard's as-applied due process and equal protection claims.

*564 *2. Substantive due process*

[14] ¶ 25 The right to due process is protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution. The substantive component of the Fourteenth Amendment's due process clause forbids the government to infringe on fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores,* 507 U.S. 292, 301-02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

**879 [15] ¶ 26 Generally, when there is no alleged violation of a fundamental right, the challenged state action need only be rationally related to a legitimate government interest. *See, e.g., City of Bremerton v. Widell,* 146 Wash.2d 561, 580, 51 P.3d 733 (2002); *Washington v. Glucksberg,* 521 U.S. 702, 722, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). The defendant challenging the constitutionality of a statute must show that the law is so unrelated to the achievement of a legitimate purpose that the law is arbitrary or obsolete. *Seeley v. State,* 132 Wash.2d 776, 813, 940 P.2d 604 (1997).

[16][17] ¶ 27 The police powers of government allow the legislature to enact laws in the interests of the people. *Weden v. San Juan County,* 135 Wash.2d 678, 691, 958 P.2d 273 (1998). The scope of that power is broad and encompasses measures which bear a reasonable and substantial relation to promotion of the general welfare of the people. *Id.* at 692, 958 P.2d 273. In legislating for the general health, safety, and welfare of the people, certain constraints on individual freedom have traditionally been imposed by the state. *State v. Smith,* 93 Wash.2d 329, 339, 610 P.2d 869 (1980). It is not the proper function of the courts to substitute their judgment for that of the legislature with respect to the necessity of these constraints. *Id.*

[18] ¶ 28 The state's interest in protecting children from sexual exploitation and abuse is a compelling government objective that justifies at least some regulation of sexual conduct, even where it infringes on the right to privacy. *Farmer,* 116 Wash.2d at 422, 805 P.2d 200. Courts show even greater deference to the determinations of the state in the context *565 of education. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 328, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

¶ 29 The state is constitutionally obligated to provide an education to its children. CONST. art.

IX. As part of that duty, the state has a legitimate interest in providing a safe school environment. Among the concerns that support RCW 9A.44.093(1)(b) is the fear that unsupervised access to children could be used by adults to groom or coerce the students into sexual exploitation. In this case, this concern seems especially cogent, as Mr. Clinkenbeard appears to have begun his sexual overtures toward M.Q. when she was only 12 years old.

[19] ¶ 30RCW 9A.44.093(1)(b) is relevant to the concerns of protecting children from sexual exploitation. The statute makes it illegal for those in contact with much younger children without outside supervision to use their access to students for sexual exploitation. Because this statute is not wholly irrelevant to the goal of preventing the exploitation of students, and therefore is not arbitrary, RCW 9A.44.093(1)(b) did not violate Mr. Clinkenbeard's right to substantive due process in this case.

3. Equal protection

¶ 31 The Fourteenth Amendment provides that, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws," and the Washington State Constitution provides for the right of equal protection in article I, section 12.

[20] ¶ 32 The equal protection clauses of the federal and state constitutions require that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. *State v. Harner,* 153 Wash.2d 228, 235, 103 P.3d 738 (2004). At the threshold of an equal protection determination, the court must first identify the standard of review. *O'Hartigan v. Dep't of Pers.,* 118 Wash.2d 111, 122, 821 P.2d 44 (1991).

[21][22][23] ***566** ¶ 33 One of three tests may be used to determine whether the right to equal protection has been violated. First, strict scrutiny applies when a classification affects a suspect class or a fundamental right. *Westerman v. Cary,* 125 Wash.2d 277, 294, 892 P.2d 1067 (1994). Under the strict scrutiny test, a law may be upheld only if it is shown to be necessary for a compelling state interest. *Id.* Second, the intermediate scrutiny test may apply in certain limited circumstances where the classification affects an important right and applies to a semi-suspect class not accountable for its status. *Id.* Under****880** this test, the law must fairly be viewed as furthering a substantial interest of the state. *City of Richland v. Michel,* 89 Wash.App. 764, 771, 950 P.2d 10 (1998). Third, the rational basis test applies when the challenged classification involves neither a fundamental right nor a suspect classification. *O'Hartigan,* 118 Wash.2d at 122, 821 P.2d 44. Under the rational basis test, the law is subject to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective. *Westerman,* 125 Wash.2d at 294-95, 892 P.2d 1067.

¶ 34 Because *Lawrence* did not recognize a fundamental right of consenting adults to engage in private, sexual behavior without government interference, strict scrutiny does not apply in this case.

¶ 35 However, Mr. Clinkenbeard may have an argument for the application of intermediate scrutiny. While the *Lawrence* court did not establish that private sexual behavior between consenting adults was protected as a fundamental right, the court did make clear that this area of autonomy is of great importance. The decision cautions strongly against the states interfering in private relationships. *Lawrence,* 539 U.S. at 567, 123 S.Ct. 2472. The court also referred to the importance of safeguarding the individual liberty of adult persons to decide for themselves how to conduct their private lives in matters relating to sex. *Id.* at 572, 123 S.Ct. 2472. Therefore, the *Lawrence* decision may have established private sexual behavior between consenting adults as an important right.

***567** ¶ 36 Even assuming that *Lawrence* did establish an important right, intermediate scrutiny does not apply to this case because Mr. Clinkenbeard has not demonstrated his membership in a semi-suspect

class. The class at issue in RCW 9A.44.093(1)(b) is public school employees. Prior decisions indicate that a particular employment status does not create a semi-suspect class. *See, e.g., Griffin v. Eller,* 130 Wash.2d 58, 65, 922 P.2d 788 (1996). Mr. Clinkenbeard has not demonstrated either how this class is semi-suspect, or how it is not accountable for its status. Therefore, intermediate scrutiny should not be applied in this case.

[24] ¶ 37 Because this case does not involve the infringement of a fundamental right, or the infringement of an important right and disparate treatment of a semi-suspect class, we apply the rational basis review to Mr. **Clinkenbeard's** claim. In order to invalidate the statute based on equal protection grounds, Mr. **Clinkenbeard** must show, beyond a reasonable doubt, that no state of facts exist that justify the challenged classification. *Smith,* 93 Wash.2d at 337, 610 P.2d 869. A legislative distinction will survive the rational basis test if (1) all members of the class are treated alike; (2) there is a rational basis for treating differently those within and outside of the class; and (3) the classification is rationally related to the purpose of the legislation. *O'Hartigan,* 118 Wash.2d at 122, 821 P.2d 44.

[25] ¶ 38 Here, the pertinent class is public school employees. There is nothing else in the text of RCW 9A.44.093(1)(b) that distinguishes among the public school employees that are covered by the statute. The statute singles out public school employees because they have unique access to children, often in an unsupervised context, and can use that access to groom or coerce children or young adults into exploitive or abusive conduct. Given the important goals of providing a safe school environment for children and preventing the sexual exploitation of children, this distinction has a basis that is rationally related to those important and compelling government purposes. As such, the application of RCW 9A.44.093(1)(b) to Mr. Clinkenbeard's case did not constitute a violation of his right to equal protection.

***568** ¶ 39 We hold that RCW 9A.44.093(1)(b) is not facially unconstitutional as a violation of substantive due process or equal protection. We also hold that there was no constitutional violation based on the application of RCW 9A.44.093(1)(b) to Mr. **Clinkenbeard's** case.

II. USE OF IMPEACHMENT EVIDENCE AS SUBSTANTIVE EVIDENCE OF GUILT

¶ 40 Mr. **Clinkenbeard** alleges that the trial court improperly permitted impeachment ** testimony to be used as substantive evidence of guilt in his case. He further argues that, absent the out-of-court statements made by M.Q. about having sex with Mr. **Clinkenbeard,** there is insufficient evidence to support his conviction.

[26] ¶ 41 Mr. **Clinkenbeard's** assertion presents two questions for review. First, did the State improperly use impeachment evidence as substantive evidence of guilt? Second, if the impeachment statements were improperly used, was the remaining evidence sufficient to support the conviction? From the record before this court, it appears that the State did use impeachment evidence as substantive evidence of guilt, and that this was the sole evidence of the essential element of sexual intercourse in this case. Because there was no other evidence from which a reasonable jury could have found the essential element of sexual intercourse, we hold that there was insufficient evidence to convict Mr. Clinkenbeard of sexual misconduct with a minor and reverse his conviction with prejudice.

A. State's use of impeachment evidence as substantive evidence of guilt

[27] ¶ 42 We review a trial court's rulings on the admissibility of the evidence under an abuse of discretion standard. *State v. Powell,* 126 Wash.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists when the trial court's exercise of discretion is manifestly unreasonable or is based upon untenable grounds. *Id.*

*569 ¶ 43 Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. ER 801(c). Generally, hearsay is not admissible as evidence unless specifically permitted by the rules of evidence, by court rules, or by statute. ER 802.

[28] ¶ 44 An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, even if the statement was made and acknowledged by someone who is an in-court witness at trial. *State v. Sua,* 115 Wash.App. 29, 41, 60 P.3d 1234 (2003).

¶ 45 Mr. Clinkenbeard was charged with sexual misconduct with a minor under RCW 9A.44.093(1)(b). This statute makes it a crime for a public school employee to have sex with a student if the two are not married to each other and the employee is at least five years older than the student. RCW 9A.44.093(1)(b). Therefore, the State was required to prove that Mr. Clinkenbeard and M.Q. had sexual intercourse as part of the sexual misconduct with a minor charge.

¶ 46 Statements made by M.Q. to others were used as the sole proof of the element of sexual intercourse in this case. These statements were allowed in as impeachment evidence based on M.Q.'s denial at trial that she and Mr. Clinkenbeard had sexual intercourse. These statements, as hearsay, would not otherwise have been admissible.

¶ 47 A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court, even if such a statement would otherwise be inadmissible as hearsay. *State v. Dickenson,* 48 Wash.App. 457, 466, 740 P.2d 312 (1987). Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence. *State v. Johnson,* 40 Wash.App. 371, 377, 699 P.2d 221 (1985).

¶ 48 Because such evidence cannot be used as substantive proof of guilt, the State may not use impeachment as a guise for submitting to the jury substantive evidence *570 that would otherwise be inadmissible. *State v. Babich,* 68 Wash.App. 438, 444, 842 P.2d 1053 (1993). The concern behind this prohibition is that prosecutors will exploit the jury's difficulty in making the subtle distinction between impeachment and substantive evidence. *See, e.g., State v. Hancock,* 109 Wash.2d 760, 763, 748 P.2d 611 (1988).

¶ 49 Here, the only evidence that established sexual intercourse between M.Q. and Mr. Clinkenbeard came from the impeachment evidence brought out on the State's direct examination of Sergeant Hall and from the testimony of one of M.Q.'s friends, Reanna Gall. The record does contain at least one objection by Mr. Clinkenbeard to the testimony**882 provided by Ms. Gall regarding anything that M.Q. might have said.

¶ 50 The State represented to the court that any questions directed to Ms. Gall about what M.Q. might have said regarding her relationship with Mr. Clinkenbeard were solely for impeachment purposes and would be limited to the scope of questions previously put to M.Q. The State asserted that the purpose of the testimony regarding M.Q.'s statements was to impeach M.Q.'s denial that she made the statements and of the sexual relationship between her and Mr. Clinkenbeard.

[29] ¶ 51 The admission of M.Q.'s statement to Sergeant Hall would ordinarily be a violation of the hearsay rule. While the record is less clear as to the basis for admitting Sergeant Hall's testimony as to M.Q.'s statement, the statement appears to be impeachment evidence against M.Q.'s denial that the sexual intercourse occurred. The admission of M.Q.'s statement is permissible for this purpose, as the State is allowed to impeach its own witness using a prior inconsistent statement. ER 607. This is the case even if the in-court witness acknowledges that the prior inconsistent statement was made. *See, e.g., Sua,* 115 Wash.App. at 33-34, 60 P.3d 1234.

¶ 52 Despite the fact that the proper use of M.Q.'s prior inconsistent statements was for impeachment purposes only, the State used them as substantive evidence of *571 guilt at trial. In its closing statements to the jury, the prosecution asserted that M.Q.'s statements to Sergeant Hall and Ms. Gall were proof of sexual intercourse between M.Q. and Mr. Clinkenbeard. Therefore, we hold that this was an improper use of impeachment testimony as substantive evidence.

¶ 53 The State urges that the issue of the use of impeachment testimony as substantive evidence was waived by Mr. Clinkenbeard because he failed to make an objection on the record. However, the trial court in this case made no record of any of the objections, arguments, or rulings that took place outside of the presence of the jury. The trial court noted that it had no court reporter and, in order for the parties to discuss anything outside the presence of the jury, the court had to "turn off the sound system and then there's no record." RP II at 15-16.

[30] ¶ 54 While normally the onus is on the appellant to perfect the trial record, a criminal defendant also has a due process right to a record of sufficient completeness for review of errors. *State v. Larson,* 62 Wash.2d 64, 66-67, 381 P.2d 120 (1963); *State ex rel. Henderson v. Woods,* 72 Wash.App. 544, 550-52, 865 P.2d 33 (1994). In light of the fact that the omissions in the record are extensive, and there is virtually no way for Mr. Clinkenbeard to supplement the record or to prove the specific content of the omitted sections, we decline to deem this issue waived.

B. Sufficiency of the evidence

¶ 55 Having determined that the State improperly used impeachment evidence as substantive evidence in this case, we must next determine whether there was any other evidence sufficient to support Mr. Clinkenbeard's conviction for sexual misconduct with a minor.

[31][32] ¶ 56 Evidence is sufficient to support a conviction if, when taken in the light most favorable to the state, the evidence would allow any rational trier of fact to find the elements of the crime beyond a reasonable doubt. *State v. DeVries,* 149 Wash.2d 842, 849, 72 P.3d 748 (2003). A claim of *572 insufficiency admits the truth of all of the State's evidence and all of the inferences that can reasonably be drawn from it. *Id.* However, there must be at least substantial evidence that supports the elements of the crime charged. *State v. Cleman,* 18 Wash.App. 495, 498, 568 P.2d 832 (1977).

¶ 57 In this case, the State was required to prove beyond a reasonable doubt that M.Q. and Mr. Clinkenbeard engaged in sexual intercourse as an essential element of the crime of first degree sexual misconduct with a minor. "Sexual intercourse" is defined according to its ordinary meaning, and includes any penetration that is not for medical treatment or diagnostic purposes as well as any act of sexual contact between the sex organs **883 of one person and the mouth or anus of another. RCW 9A.44.010(1).

¶ 58 In the absence of M.Q.'s statements to Sergeant Hall and Ms. Gall regarding having sex with Mr. Clinkenbeard, there is no other evidence in this case that would establish the conduct that is required to prove sexual intercourse. Because there is no other evidence at all in the record regarding the specific act of sexual intercourse, there is insufficient evidence to allow a rational trier of fact to find the elements of the crime beyond a reasonable doubt. As such, there is insufficient evidence in this case to support Mr. Clinkenbeard's conviction for first degree sexual misconduct with a minor.

[33] ¶ 59 A defendant whose conviction is reversed due to insufficient evidence cannot be retried. *DeVries,* 149 Wash.2d at 853, 72 P.3d 748. Therefore, we reverse Mr. Clinkenbeard's conviction with prejudice.

WE CONCUR: KATO, C.J., and BROWN, J.
Wash.App. Div. 3,2005.

123 P.3d 872
130 Wash.App. 552, 123 P.3d 872, 203 Ed. Law Rep. 850
(Cite as: 130 Wash.App. 552, 123 P.3d 872)

State v. Clinkenbeard
130 Wash.App. 552, 123 P.3d 872, 203 Ed. Law Rep. 850

END OF DOCUMENT